MISSISSIPPI LAW JOURNAL

ARTICLES

TOWARD THE MULTISTATE PRACTICE OF LAW THROUGH ADMISSION BY RECIPROCITY
Jerome C. Hafter

A PLEA FOR ADOPTION OF THE PROPOSED MISSISSIPPI RULES OF EVIDENCE
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1982 MISSISSIPPI SUPREME COURT REVIEW

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TOWARD THE MULTISTATE PRACTICE OF LAW THROUGH ADMISSION BY RECIPROCITY

*Jerome C. Hafter**

Introduction

Insularity in bar admissions is increasingly at odds with the realities of our national economy and with the personal and professional needs of practicing attorneys. Clients' legal problems do not follow state boundaries. An attorney's inability to service his clients' legal business in several jurisdictions necessitates duplicative work by different attorneys and increases the cost of legal services. In addition, development of highly specialized fields of law has created experts whose services may be desired by clients on a regular basis in more than one jurisdiction.

It is also becoming more common for the modern practitioner to change the principal location of his practice during his career. Present laws and court rules restricting admission of practicing attorneys in multiple jurisdictions constitute substantial barriers to relocation and to multistate practice by the nonrelocating attorney. This problem is accentuated by those states that require all applicants, including those previously admitted to the bar in other states, to take and to pass their general bar examinations.

For many years, the legal profession has debated the merits of procedures that would facilitate the multi-state practice of

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* Partner, Lake, Tindall, Hunger & Thackston, Greenville, Mississippi. B.A., 1967, Rice University; B.A. & M.A., 1969, Oxford University; J.D., 1972, Yale University. Chairman, Mississippi Board of Bar Admissions, 1979-1983. Vice-Chairperson, Committee on Issues Affecting the Legal Profession, Young Lawyers Division, ABA. Mr. Hafter is the author of the proposed Uniform Standard for Admission of Attorneys by Reciprocity.

law.[1] Chesterfield Smith, a past president of the American Bar Association, has described the need to reduce these barriers:

> Admission to the bar in another state through a general bar examination becomes increasingly difficult for the proficient, older lawyer who wants only a limited practice in an additional state, or who because of client demand wants to practice in multiple states, or who wants to migrate to a state where the demand for practitioners in a particular branch of the law is large, or who wants to associate in a law firm with lawyers from other states and offer firm—wide, multi-office service to clients in several states, or who simply made a geographical mistake in selecting a state in which to practice. The better a lawyer is in one branch of the law, the more specialized in a particular area of the law practice, the greater the lawyer's difficulty in gaining admission through a general bar examination. A state that chills interstate bar admissions is saying that it prefers the systematized knowledge of a recent graduate of law school to the specialized skills acquired only through extensive experience in the courtroom, and the negotiating conference, or in the law office.
>
> In every area of law practice there is an ever-increasing need for broadening, not narrowing, of the right of interstate practice. Large national law firms will be commonplace soon. The multi-office practice of law, both intrastate and interstate, already is a professional way of life. As the world becomes smaller and national and international legal activity increases, the states should recognize that lawyers' skills do not terminate at a state's boundaries. Much of the daily routine of the average practitioner encompasses laws that are national in scope. It would be to the direct benefit of both the public and the legal profession for every state to allow qualified and experienced lawyers of approved character from other states, under proper regulation and registration, to practice law any-

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[1] *Compare* Smith, *Time For A National Practice of Law Act*, 64 A.B.A. J. 557, 558-59 (1978) (advantages of an interstate bar) *and* Brakel, *A Look At Multistate Practice Restrictions*, 60 A.B.A. J. 1084, 1086 (1974) (limited licensing and temporary association provide solutions to interstate barriers) *and* Morris, *State Borders: Unnecessary Barriers to Effective Law Practice*, 53 A.B.A. J. 530, 531 (1967) (national business relationships increase demand for interstate bar) *with* Young, *A National Bar? No!*, 54 FLA. B.J. 109, 111-12 (1980) (concept of separate sovereign states requires distinct bar admission requirements based on local conditions).

where in the United States.[2]

The purposes of this article are (1) to review the present status of admission by reciprocity among American jurisdictions, (2) to examine the Uniform Standard for Admission of Attorneys by Reciprocity, which has been proposed for adoption by the American Bar Association, and (3) to explain how admission by reciprocity, coupled with the overturning of residency requirements, may now essentially permit a nationwide practice of law.

I. Present Status of Admission by Reciprocity

Each state has the right to establish qualifications for admission to the practice of law. The state,[3] as well as the legal profession,[4] has a legitimate interest in ensuring the integrity and the competency of persons who are permitted to practice law. At the present time, all American jurisdictions utilize written bar examinations for the purpose of verifying the technical competence of new attorneys.[5] In addition, all jurisdictions have

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[2] Smith, *supra* note 1, at 558.

[3] *See* Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, 159 (1971) (bar applicants must possess requisite character for admission as attorney); Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957) (states may require high standards of qualification for bar admission).

[4] *See* Model Code of Professional Responsibility Canon 1 (1980) ("A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession.") Adequate standards for admission to the bar are endorsed to protect the public "'from those who are not qualified to be lawyers by reason of a deficiency in education or moral standards or of other relevant factors." *Id.* EC 1-2.

[5] The written bar examination administered in each state by a centralized agency was developed in response to the lack of uniform admission standards in local courts in the 19th century. The Bar Examination Study Project of the American Association of Law Schools has concluded:

> The written bar examination, although the target of attacks from many directions, remains the most effective, and the fairest, tool yet devised for the screening of applicants for admission to the Bar. The essay examination is effective because it requires the candidate to demonstrate the ability to spot legal issues, distinguish relevant from irrelevant facts, analyze the problem, marshall the facts and arguments and come up with a logical, rational answer on a question that may well cross course lines by applying appropriate rules of law in a way that indicates an understanding of the purposes behind the controlling rules. It is fair because it assures uniformity in questions asked on a predetermined list of legal subjects and in the quality of acceptable answers by the applicants.

established systems for investigating the background and ethical character of the applicants for admission to the state bar.

It necessarily follows from the recognized power of individual states to regulate admission requirements within their jurisdiction that a license to practice law granted in one state does not confer an absolute right to practice law in another state.[6] Neither general principles of comity nor any constitutional provision require the respective states to admit to their bars attorneys admitted in other jurisdictions.[7] All American jurisdictions presently prohibit the general unrestricted practice of law by persons not admitted within that state.[8]

A majority of American jurisdictions, however, do admit to general practice, without additional examination, members of the bar of other states who establish residence in the state in which application for admission is made. This admission is known as "admission by reciprocity," "admission by comity," or "admission on motion."[9] The waiver of the examination requirement when the applicant has actively practiced law in another state for a specified length of time recognizes that original admission in the other jurisdiction, coupled with actual experience as a practitioner, is "at least as meaningful for assurance of gen-

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Stevens, *Diploma Privilege, Bar Examination or Open Admission*, 46 B. EXAMINER 15, 34 (1977).

[6] *See* Hawkins v. Moss, 503 F.2d 1171, 1175-76 (4th Cir.), *cert. denied*, 420 U.S. 928 (1974); Goldsmith v. Pringle, 399 F. Supp. 620, 625 (D. Colo. 1975).

[7] *See* Attwell v. Nichols, 466 F. Supp. 206, 209 (N.D. Ga.), *aff'd*, 608 F.2d 228 (5th Cir. 1979); *In re* Wasserman, 240 F.2d 213, 214-15 (9th Cir. 1956).

[8] This prohibition is tempered by the almost universal practice of allowing admission *pro hac vice* to render legal services in connection with a specific matter. Admission *pro hac vice* may be sufficient for limited matters, particularly litigation, but provides no assistance to the relocating or multistate practitioner. *See, e.g.*, Nahstoll, *Freedom to Practice Law in Another State*, 55 A.B.A. J. 57, 59-60 (1969) (favoring liberal construction of *pro hac vice* requirements); Note, *Attorneys: Interstate and Federal Practice*, 80 HARV. L. REV. 1711, 1716-23 (1967) (same); Note, *The Practice of Law by Out-of-State Attorneys*, 20 VAND. L. REV. 1276, 1282-94 (1967) (*pro hac vice* practice in general) [hereinafter cited as Note, *The Practice of Law*].

[9] Admission by reciprocity, as the term is used in this article, refers to the permanent admission of attorneys admitted to practice law in other jurisdictions without requiring these attorneys to pass the admitting jurisdiction's regular bar examination. This is distinguished from admission *pro hac vice* for the trial of a single matter or for any other temporary purpose, even though the latter may be referred to as "reciprocity" in the rules of some states. Annot., 51 A.L.R. 2d 1198, 1199 (1955).

eral competence as the typical examination."[10]

States vary considerably in their treatment of practicing attorneys from other states who seek general admission in the new jurisdiction.[11] Thirty-one states and the District of Columbia presently admit out-of-state attorneys without additional examination on their legal knowledge, provided that the attorney has practiced in another jurisdiction for a prescribed period of time, is in good standing in the state of prior admission, and meets certain additional requirements. Eight states require a special modified bar examination for previously admitted attorneys. The remaining eleven states require all applicants, including attorneys previously admitted in other jurisdictions, to take the same general bar examination as new law student applicants.[12]

States recognizing no reciprocity and states requiring special attorneys' bar examinations fall almost entirely into two categories: (1) states in the Southeast[13] or the Far West[14] and (2) states in the Northeast, which serve as "bedroom" or "second home" areas for attorneys from nearby major legal centers.[15] It is apparent that the states restricting admission by reciprocity are jurisdictions in which the local bar is subject to the potential influx of attorneys admitted in other jurisdictions because of expanding population, economic growth, or the movement of attorneys into suburban areas, second home, or retirement communities.[16] It has been asserted, with justification, that those states

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[10] Note, *Attorneys: Interstate and Federal Practice*, *supra* note 8, at 1713.

[11] The Appendix to this article contains a summary of the current rules and statutes in the 50 states and the District of Columbia relating to admission of practicing attorneys without examination.

[12] *See* Appendix, section 1. A number of those states do make special provisions for admission, without examination, for fulltime law professors teaching in state law schools. This is a special courtesy presumably intended to assist law schools in attracting faculty members and has no general application to multistate practice. *See* Appendix, note b.

[13] Alabama, Florida, Georgia, Louisiana, and South Carolina require all applicants to take their regular bar examination. *See* Appendix, section 1.

[14] Arizona, Hawaii, Nevada, and Washington require all applicants to take their regular bar examination. Alaska, California, Idaho, New Mexico, and Oregon require special attorneys' examinations. *See* Appendix, section 1.

[15] New Hampshire and New Jersey require all applicants to take their regular bar examination. Delaware, Maine, and Maryland require special attorneys' examinations. *See* Appendix, section 1.

[16] Among the states allowing admission by reciprocity without examination, the only one requiring more than five years of practice, Colorado, shares the same characteristics

that have made the admission of attorneys most difficult have done so primarily to protect the economic interests of the local bar.[17] The recent trend in these states has been away from liberal admission by reciprocity.[18] This tendency appears to reflect the prevailing attitude of members of the bar in these jurisdictions.[19]

II. Rationale for Restrictions on Admission by Reciprocity

Other than the economic protection of the local bar, which is not a legally permissible basis for barring admission of otherwise qualified attorneys,[20] there are two primary justifications

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of the states prohibiting reciprocity or requiring special attorneys' examinations. *See* Appendix, note d.

[17] Dalton & Williamson, *State Barriers Against Migrant Lawyers*, 25 U. Kan. City L. Rev. 144, 147-48 (1957).

[18] In 1968, a survey by the National Conference of Bar Examiners showed that 41 jurisdictions admitted attorneys by reciprocity without re—examination. Nat'l Conference of B. Examiners, The Bar Examiner's Handbook 324-35 (1st ed. 1968). At that time, three or four states gave a special attorneys' examination, and the rest of the nonreciprocity states required the migrant attorney to take the regular examination. *Id.* at 116. By 1983, the number of states allowing reciprocity without examination had declined to 32. Among the states most recently repealing admission by reciprocity were Georgia in 1975, Attwell v. Nichols, 466 F. Supp. 206, 208 (N.D. Ga.), *aff'd*, 608 F.2d 228 (5th Cir. 1979) and South Carolina in 1974, Hawkins v. Moss, 503 F.2d 1171, 1174 n.1 (4th Cir.), *cert. denied*, 420 U.S. 928 (1974).

[19] *See* Young, *supra* note 1, at 112. A Lawpoll conducted by the ABA in 1977 indicated vast regional differences on the question whether all states should grant reciprocal admission to practicing attorneys from other states. In the Midwest, where all states now provide for reciprocity without special examination, this proposal won a 48% to 46% plurality. The idea was rejected in the West (26% to 73%), Southwest (28% to 66%), and Southeast (30% to 68%). Nationwide, 36% of attorneys polled favored liberalized reciprocity, but 60% voted to maintain the status quo. The opinions were surprisingly uniform by age group: 35% of attorneys aged 21-34 favored unlimited reciprocity, compared with 31% of those 45 and older. *Specialization, Relicensing, Reciprocity: What Do Lawyers Think?*, 63 A.B.A. J. 1705, 1707 (1977).

[20] Restrictive admissions rules must rest solely on the need for protection of the public interest. Appell v. Reiner, 43 N.J. 313, 316, 204 A.2d 146, 148 (1964); *see* Note, *The Practice of Law*, *supra* note 8, at 1279. Economic protection of existing attorneys is not a valid consideration. *See* Darby v. Mississippi Bar Examiners, 185 So. 2d 684, 687 (Miss. 1966) (bar membership does not exist to prevent lay competition). *But see* Sanders v. Russell, 401 F.2d 241, 246 (5th Cir. 1969) (bar members' financial and economic interests are valid considerations); McKenzie v. Burris, 255 Ark. 330, 500 S.W.2d 357, 366 (1973) (same). Limiting the admission of new attorneys for economic protection of the existing bar may subject the admitting authority to liability under the Sherman Antitrust Act. *See* Ronwin v. State Bar, 686 F.2d 692, 700 (9th Cir. 1982). But there is no

for imposing additional requirements for reciprocal admission beyond proof of admission in another jurisdiction and current good standing. First, reexamination or other restrictions, particularly length-of-practice requirements, prevent or at least discourage circumvention of high original admission standards by obtaining a license to practice in a jurisdiction with lower standards, followed by an application for reciprocal admission.[21] Second, the requirement of an additional examination ensures that all persons admitted to a state's bar, including attorney-applicants from other states, become familiar with local rules of practice and peculiarities of the admitting state's substantive law. Today, these rationales have less validity than they did in the past and no longer justify the imposition of a re-examination requirement on previously admitted attorneys from other jurisdictions.

A. Different Admission Standards

At one time, admission standards varied significantly among the states. In the past, many American jurisdictions had minimal requirements for legal and pre-legal education. At present, however, all states require an undergraduate degree plus, in most states, graduation from an organized law school.[22] Today,

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question that local protectionism is a major motivation of vocal opponents of liberalizing reciprocal admissions. *See* Young, *supra* note 1, at 112.

[21] NAT'L CONFERENCE OF B. EXAMINERS, THE BAR EXAMINER'S HANDBOOK 198 (2d ed. 1980). At least six states, Connecticut, Illinois, Indiana, Minnesota, Ohio, and Wisconsin, address the circumvention problem by denying admission by reciprocity to attorneys who have previously failed that state's own bar examination. *See* Appendix, note h. This provision has been sustained as making a rational distinction between those attorneys licensed for the required time in other jurisdictions, but who have actually taken and failed the local examination, and other out-of-state attorneys, who, by their admission in their home jurisdiction and length of practice, are, in the absence of specific proof to the contrary, presumed to be qualified for admission without reexamination. Ktsanes v. Underwood, 467 F. Supp 1002, 1007 (E.D. Ill. 1979).

[22] As late as 1950, 35 states permitted law office study as preparation for admission to the bar. Kirkwood, *Requirements for Admission to Practice Law*, 20 B. EXAMINER 18, 31 (1951). By 1976, only five states still permitted this type of professional training. Stevens, *supra* note 5, at 15. At present, there are only four states, California, Mississippi, Vermont, and Virginia, in which attorneys can prepare for the bar examination by law office study and one of these, Mississippi, has repealed its law office study option, effective in 1984. Act of Apr. 16, 1979, ch. 486, 1979 Miss. Laws 999 (codified at MISS. CODE ANN § 73-3-2 (Supp. 1982)). In 1981, the most recent year for which bar admission statistics are available, only 18 of 42,382 new attorneys admitted in the United States pre-

the only major variation among the states regarding professional training is whether graduates of non-ABA approved law schools can be admitted by examination.[23] Thus, there is now little difference in the educational requirements for initial admission among American jurisdictions.

There are also minor differences among the states over bar examination requirements. Prior to 1890, only a few progressive states required centralized written bar examinations, as opposed to informal oral examinations conducted in local courts. By 1933, all states had adopted the requirement that new attorneys pass a written bar examination administered statewide by a board of examiners.[24] Until recent years, a small number of states granted an exemption from examination to graduates of in-state law schools. As of 1983, however, forty-nine states and the District of Columbia require all new applicants, regardless of their source of legal education, to pass a written bar examination.[25]

With the widespread use, beginning in 1972, of the Multistate Bar Examination, now adopted by forty-six states and the District of Columbia,[26] testing standards have become increas-

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pared by law office study. Smith, *1981 Bar Examination Statistics*, 51 B. EXAMINER, May 1982, at 25-27.

[23] Presently, 41 states limit their admission to graduates of ABA-approved law schools and only two, California and Indiana, allow graduates of non-ABA-approved law schools located outside their borders to take their bar examinations. *See In Re* Hansen, 275 N.W.2d 790, 793 n.3 (Minn. 1978), *appeal dismissed*, 441 U.S. 938 (1979).

[24] Stevens, *supra* note 5, at 21.

[25] As of 1983, only one state, Wisconsin, continues to admit graduates of in-state law schools without any additional examination of their legal knowledge. WIS. SUP. CT. R. 40.03. Four additional states, Mississippi, Montana, South Dakota, and West Virginia, previously admitted in-state law school graduates without examination but have repealed the "diploma privilege." *See In re* Proposed Amendments, 609 P.2d 263, 265 (Mont. 1980) (per curiam); MISS. CODE ANN. § 73-3-2 (Supp. 1979); S.D. CODIFIED LAWS ANN. § 16-16-6.1 (Supp. 1982); W.VA. CODE, § 30-2-1 (Supp. 1982).

[26] As of 1982, the only states not using the Multistate Bar Examination (MBE) as part of their bar examination were Indiana, Iowa, Louisiana, and Washington. Covington, *Multistate Bar Examination Statistics*, 51 B. EXAMINER, Nov. 1982, at 26. In 1980, the National Conference of Bar Examiners began offering the Multistate Professional Responsibility Examination (MPRE), which is similar in format to the MBE but is restricted to testing knowledge and application of the Code of Professional Responsibility. *See* NAT'L CONFERENCE OF B. EXAMINERS, *supra* note 21, at 86. By 1983, the MPRE had been adopted as a requirement in 23 jurisdictions. Covington, *supra*, at 28.

ingly uniform. But disparities still exist in the standard of proficiency required to pass the bar examination in different jurisdictions.[27] But among the large majority of states, these differences have not created a real danger of "forum shopping" for initial admission by seeking "back-door" admission through reciprocity into a more difficult state. This is particularly true if there is a requirement of actual practice for a period of several years before an application for admission by reciprocity can be filed. If admission by reciprocity were adopted in all jurisdictions, it is doubtful that a significant number of applicants would seek admission in a jurisdiction requiring lower standards *and* practice in that jurisdiction for a period of several years simply to obtain admission in a jurisdiction with a higher standard.

B. Familiarity with Local Practice

The requirement of an additional examination, to ensure that attorneys are familiar with the peculiarities of local practice, retains viability in some unique jurisdictions such as Louisiana, which bases its domestic law upon the Napoleonic Code. Those states that require previously admitted attorneys to take regular or special bar examinations do not, however, as a group, have unique and complex substantive or procedural law that sets them apart from other states that have successfully admitted attorneys by reciprocity without local reexamination.

The trend toward uniformity of substantive and procedural law in all jurisdictions has been pronounced in recent years. There remain relatively few topics on which local practice requirements can be used to justify an additional local examination. Furthermore, the states requiring reexamination of out-of-state applicants generally have not limited these reexaminations to local practice requirements. Instead, these states have reex-

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[27] For example, the level of proficiency required to achieve a passing score on the combined essay/MBE examination in those jurisdictions with the highest passing standards can be statistically equated with a level of performance on the MBE equivalent to that achieved by only the upper 40% of all examinees nationally. On the other hand, in the most lenient jurisdictions, the standard of proficiency required for passing the combined essay/MBE is statistically equivalent to the MBE score obtained by 95% or more of all examinees nationally. These statistics were compiled by the author from data on file with the Mississippi Board of Bar Admissions.

amined practicing attorneys on a broad range of topics that were covered by the examinations in the states in which the attorneys were originally admitted.[28] Because any formal examination requirement represents a substantial barrier to reciprocal admission of experienced attorneys,[29] and because the use of "local practice" examinations has been found unnecessary in those jurisdictions that have permitted reciprocal admissions without reexamination, no provision for reexamination has been included in the recommendation for a Uniform Standard for Admission of Attorneys by Reciprocity under consideration by the American Bar Association.

III. Restrictions on Admission by Reciprocity

Even in those states in which practicing attorneys may be admitted without additional examination, admission by reciprocity has been circumscribed by additional requirements beyond proof of original admission and good standing in the attorneys' former jurisdiction.[30]

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[28] For example, the "Attorneys' Examination" in California consists of the regular California bar examination and professional responsibility examination, except for the MBE portion. California State Comm. of B. Examiners, Rules Regulating Admission to Practice Law in California, Rule XII, § 121 (1979); Letter from James B. Tippin, Jr., Executive Director, Committee of Bar Examiners of California, to the author (Oct. 2, 1980).

[29] Preparing for a formal reexamination, whether it is the state's regular bar examination or a limited "local practice" examination, is a time—consuming exercise. For administrative reasons these examinations are offered on fixed dates, usually twice each year. Months of potential delay and the cost of stopping their regular work to prepare intensively for an examination necessarily inhibit practicing attorneys' willingness to seek admission through examination in a new jurisdiction.

[30] Mississippi's statute on admission by reciprocity is typical of those in a number of other states. Miss. Code Ann. § 73-3-25 (Supp. 1982) provides:

> Any lawyer from another state whose requirements for admission to the bar are equivalent to those of this state, who has practiced not less than five (5) years and who has resided in this state for not less than six (6) months immediately preceding his application for admission to practice in this state, may be admitted to the practice in this state without examination as to his knowledge of law upon complying with the other requirements as set out in governing admission to the bar. Provided, however, the laws of the state from which the applicant comes grant similar privileges to the applicants from this state.
>
> Any lawyer from another state desiring to practice in Mississippi must make application to the board of bar admissions to practice in this state. Such

A. Length of Practice Requirement

A universal requirement before applying for reciprocal admission is a minimum length of active practice in another jurisdiction.[31] At present, the respective length of practice requirements in the thirty-two jurisdictions permitting admission by reciprocity without examination are as follows:

Length	Number of States
2 years	1 (Montana)
3 years	6 (Arkansas, Michigan, North Carolina, Texas, Utah, Wisconsin)
4 years	1 (North Dakota)
5 years	23 (including Mississippi, see Appendix, section 2)
8 or 18 years	1 (Colorado)

B. Definition of Practice

Activities that qualify to meet the practice requirement vary significantly among different jurisdictions. Many states, either by specific rules or by administrative practice, recognize as the "practice of law" for purposes of satisfying the "active practice" requirement any type of legal service that is pursued on a full-time basis.[32] In these jurisdictions, the practice requirement

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applicant shall present to the bar evidence of his good standing in the state from which he came, including a certificate from the clerk of the highest appellate court of the state from which he came, and from two (2) members of the bar of such state, certifying to his qualifications, good standing and moral character of the applicant, and may require the submission of additional evidence by the applicant. Upon satisfactory proof, and upon the applicant's compliance with the requirements of this section, the board may issue a certificate to the applicant, which certificate shall be filed in either the circuit or chancery court of his residence and shall, in vacation or termtime, be entered on the minutes of such court. Each applicant shall pay an application fee of five hundred dollars ($500.00) to the secretary of the board, which fee shall be deposited to the credit of the board of bar admissions.

[31] *See* Appendix, section 2.

[32] In *In re* Jackson, 95 R.I. 393, 187 A.2d 536 (1963), the phrase "general practice" of law for purposes of reciprocal admission was construed to encompass:

> [A]ll of the manifold activities of a legal nature that inhere in the consequences of those human relationships of which the law takes cognizance.

may be satisfied not only by traditional private practice but also by employment as corporate counsel, government practice, military service as a legal officer, judicial service including tenure as a law clerk, and by teaching in law schools.[33]

Other states, in contrast, have drawn narrow distinctions between categories of practice. These states have erected barriers to reciprocal admission of attorneys who have worked for the federal government,[34] or as judge advocates,[35] law professors,

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> These human relationships of which the law takes cognizance tend to generate conflicts of interest and frequently to result in litigation. It has long been the policy of the law, reflecting enduring public interest therein, to adjust these conflicts and to terminate such litigation as arises therefrom. Generically, it is the achievement of such adjustments of conflicting interests and the determination of litigation arising out of such conflicts that constitute the practice of law. It is our view that the term "general practice" as used in this rule encompasses all legal activities that are relevant to these human relationships and that the lawyer who actively engages in the adjustment of such conflicts or in the conduct of litigation resulting therefrom is engaged in the general practice.

Id. at 539-40.

[33] The Mississippi Board of Bar Admissions has adopted a broad definition of "practice" satisfying the length of practice requirement under the Mississippi statute, which states:

> For purposes of admission under this Rule, practice for not less than five (5) years must consist of active practice of law, after admission to the bar of another jurisdiction, either as a partner or associate of a private or public law firm, as a legal officer of a corporation or other business organization, as a governmental employee whose duties are primarily providing legal advice or representation of the governmental agency in the courts, as a legal officer in the Armed Services, as a judge, magistrate, administrative judge or referee, or law clerk to a judge, or as a full time teacher in a law school approved by the Section on Legal Education and Admission to the Bar of the American Bar Association.

MISSISSIPPI STATE BD. OF BAR ADMISSIONS, RULES GOVERNING ADMISSION TO THE MISSISSIPPI STATE BAR, Rule VI, § 6 (1982).

[34] *See In re* Dodd, 132 Conn. 237, 43 A.2d 224, 228 (1945) (National Youth Administration attorney failed to meet practice requirement); Edmonds v. Webb, 182 Md. 60, 32 A.2d 702, 703 (1943) (attorney for National Labor Relations Board not practicing law). *Compare In re* Payne, 430 P.2d 566, 569-70 (Alaska 1967) (employment with Army Corps of Engineers sufficient under reciprocity statute when 65% of services rendered were legal) *with In re* Gray, 430 P.2d 571, 572-73 (Alaska 1967) (Immigration and Naturalization employment inadequate when no evidence presented that applicant spent most of time rendering legal services).

[35] *See In re* Babcock, 387 P.2d 694, 698 (Alaska 1963) (time spent in military performing work of a legal nature did not constitute "practice of law"); State *ex rel.* Laughlin v. Washington State Bar Ass'n, 26 Wash. 2d 914, 176 P.2d 301, 311 (1947) (same). *But see* State Bar v. Haas, 133 Ga. App. 311, 211 S.E.2d 161, 164-65 (1974) (service as

and corporate counsel.[36] These distinctions discriminate against the substantial number of attorneys who practice in corporate, governmental, judicial, and educational capacities. Not coincidentally, experience suggests that the attorneys serving in these capacities are among those whose career plans involve multiple relocations and who, consequently, are most likely to seek admission by reciprocity in new jurisdictions.

In addition, it seems significant that the two goals sought to be met by imposition of length of practice requirements—discouraging attempts to evade stringent initial admission requirements while, at the same time, assuring a certain minimum level of proficiency on the part of the attorney seeking reciprocal admission—are no less likely to be served by the admission of, for example, a corporate lawyer than by the admission of a traditional practitioner. This approach is well-illustrated by the liberal definition of "practice of law" propounded by the National Conference of Bar Examiners.[37]

C. Location of Qualifying Practice

A number of jurisdictions recognize the practice of law as satisfying the experience requirement only if performed in a state in which the attorney was formally admitted to practice.[38]

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judge advocate in armed forces constituted "practice of law"); Lanning v. State Bd. of Bar Examiners, 72 N.M. 332, 383 P.2d 578, 579-80 (1963) (same). *See generally* Hodson, *The Judge Advocate Lawyer*, 34 B. EXAMINER 56, 61 (1965) (judge advocates should qualify under reciprocity statutes).

[36] *But see In re* Hunt, 155 Conn. 186, 230 A.2d 432, 434-35 (1967) (work as corporate counsel qualifies as "practice of law"); *In re* White, 414 Pa. 498, 200 A.2d 893, 894-95 (1964) (same); *In re* Jackson, 95 R.I. 393, 187 A.2d 536, 539-40 (1963) (same). *See generally* Bracken, *What Constitutes Law Practice for Admission to the Bar on Motion or by Comity?*, 29 B. EXAMINER 43, 43-54 (1960) (panel discussion at the 1959 National Conference of Bar Examiners); Littler, *The Law Professor and the Corporate Counsel*, 34 B. EXAMINER 62, 62-68 (1965) (panel discussion at the 1964 National Conference of Bar Examiners).

[37] The National Conference of Bar Examiners suggests that "practice of law" for purposes of admission by reciprocity should consist of "gainful employment performing legal services, which are services which may not be properly performed by a lay person." NAT'L CONFERENCE OF B. EXAMINERS, *supra* note 21, at 202.

[38] The Mississippi Board of Bar Admissions has adopted a similar requirement:

> Practice of law which qualifies for purposes of this Rule must have occurred within a state or states in which the applicant was then admitted to practice law and must have occurred while applicant was licensed by and in good stand-

This requirement has been defended on the basis that legal services performed in a state in which an attorney has not been admitted are not subject to the same scrutiny as services performed in a state in which the attorney is formally admitted and whose courts have authority to revoke or suspend the license that he holds.[39] Counting this practice toward satisfying the active practice requirement would, in the words of one court, be "tantamount to affixing an *ex post facto* imprimatur of approval on what might under some circumstances be construed as an unauthorized practice of law."[40] This argument is most persuasive when the applicant subsequently attempts to count, for formal admission by reciprocity purposes, time spent "practicing" within the same jurisdiction in which he applies for admission.[41]

The requirement of admission in the geographical locale of practice poses a particular burden on military judge advocates and other federal government attorneys who, during their period of service, may practice in a number of geographical jurisdictions in which they are not admitted by the local courts, but

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ing with the court or other agency having authority over the practice of law in such jurisdiction.

MISSISSIPPI STATE BD. OF BAR ADMISSIONS, RULES GOVERNING ADMISSION TO THE MISSISSIPPI STATE BAR, Rule VI, § 6 (1982).

At least 20 states have requirements that qualifying practice must be in a state in which an applicant is admitted. *See* 27 FED. B. NEWS 128, 128 (1980) (table enumerating requirements for admission to bar based on practice).

[39] *See, e.g.*, Lowrie v. Goldenhersh, 521 F. Supp. 534, 536 (N.D. Ill. 1981) (rule requiring applicant to be licensed in state of previous practice not unconstitutional because rational relationship existed between rule and legitimate state interest in preventing professional misconduct), *aff'd*, 51 U.S.L.W. 2497 (7th Cir. Mar. 1, 1983); *In re* Harvey, 309 N.Y. 46, 127 N.E.2d 801, 802 (1955) (member of Georgia bar, who, during five previous years, resided in states other than Georgia, could not be admitted to New York bar without examination); *In re* Waller, 27 A.D.2d 290, 278 N.Y.S.2d 949, 950 (App. Div. 1967) (admission to New York bar denied to applicant who had been admitted to Kentucky bar in 1957, then moved to Ohio and resided there for four years, and returned to Kentucky to practice for next three and one half years).

[40] *In re* Church, 111 R.I. 425, 303 A.2d 758, 759 (1973); *see also* Ricci v. State Bd. of Bar Examiners, 427 F. Supp. 611, 611-19 (E.D. Pa. 1977) (requisite practice must be obtained in jurisdiction that licensed attorney); *In re* Lerch, 280 N.Y. 74, 19 N.E.2d 788, 789 (1939) (same).

[41] At least four jurisdictions, the District of Columbia, Montana, Ohio, and Pennsylvania, which do not limit qualifying practice to states in which the attorney has been formally admitted, do require this practice to have been performed *outside* the state in which application has been made. *See* 27 FED. B. NEWS 128, 128 (1980).

where their activities are unquestionably lawful under the supremacy clause.[42] These attorneys, applying for admission by reciprocity after the completion of their government service, have successfully challenged the application of "local admission" experience requirements.[43]

D. Limitation of Reciprocal Admission to Attorneys from States Extending Similar Privileges

Currently a number of jurisdictions, either by formal rule or by practice, extend reciprocal admission only to attorneys from states granting similar privileges to attorneys from the admitting jurisdiction.[44] These requirements have been challenged unsuccessfully on the ground that whether the jurisdiction of the attorney's former place of admission admits attorneys by reciprocity has no bearing on the fitness of the individual applicant. In these cases, the courts have generally reasoned that, because neither a "fundamental right" nor a "suspect classification" is involved, mutuality requirements are constitutionally valid because they "rationally" further the legitimate state goal of encouraging sister jurisdictions to adopt a reciprocal rule for the admission of home-state attorneys who may wish to relocate.[45] This minimum constitutional justification does not consider the

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[42] *See* U.S. CONST. art. VI, cl. 2.

[43] *See, e.g.*, Jensen v. Murphy, No. HM80-608 (D. Md. Nov. 13, 1980) (published at 49 U.S.L.W. 2338 (Nov. 13, 1980)) (rule admitting out-of-state applicants only if they practiced in jurisdiction of their admission for five of seven preceding years violates equal protection, commerce, and privileges and immunities clauses); *In re* Brewer, 506 P.2d 676, 678-79 (Alaska 1973) (requirement that practice of law for requisite five-year period be in state of prior admission has no rational relationship to applicant's fitness to practice law); State Bar v. Haas, 133 Ga. App. 311, 211 S.E.2d 161, 164 (1974) (no requirement that prior legal practice be in state of admission). *Contra* Lowrie v. Goldenhersh, 521 F. Supp. 534, 536 (N.D. Ill. 1981) (Michigan attorney whose practice had been mostly in Illinois federal courts denied admission in Illinois), *aff'd*, 51 U.S.L.W. 2497 (7th Cir. Mar. 1, 1983). *See generally* Murray & Munnecke, *FBA Aids in Court Victory for Federal Lawyers*, 28 FED. B. NEWS & J. 232, 232 (supporting rationale in *Jensen v. Murphy*).

[44] Twelve of the 32 jurisdictions permitting admission of experienced attorneys without examination expressly limit admission to attorneys from states granting similar privileges to the admitting jurisdiction's attorneys. *See* Appendix, note g.

[45] *See* Hawkins v. Moss, 503 F.2d 1171, 1177 (4th Cir.), *cert. denied*, 420 U.S. 928 (1974); Goldsmith v. Pringle, 399 F. Supp. 620, 623 (D. Colo. 1975); Shenfield v. Prather, 387 F. Supp. 676, 689 (N.D. Miss. 1974).

merits of selective mutuality and its adverse effect on the particular attoneys affected.

IV. Proposed Uniform Standard for Admission of Attorneys by Reciprocity

The perceived need to reduce barriers to the admission of multistate and relocating practitioners generated the submission of a proposal to the American Bar Association for the adoption of a Uniform Standard for Admission of Attorneys by Reciprocity. As adopted by the Young Lawyers Division of the ABA, the Uniform Standard recommends that the rules for admission in all jurisdictions be revised to provide as follows:

> Any attorney who has been admitted to practice and has been in good standing in one or more other states or the District of Columbia, for not fewer than three years out of the past preceding five years shall be admitted to practice in any state without examination, provided that such attorney has complied with all other requirements for admission to practice.[46]

This proposed Uniform Standard, in a somewhat revised version,[47] has been endorsed by a number of major sections of the

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[46] Uniform Standard for Admission of Attorneys by Reciprocity, *reprinted in* Barrett, *Breaking the Barriers to Relocation Through Reciprocal Admission to the Bar*, 8 Barrister 2, 2 (1981).

[47] The proposed Uniform Standard for Admission of Attorneys by Reciprocity was presented as Report 109 to the 1981 meeting of the ABA House of Delegates in the following form:

> An attorney who has been admitted by examination to practice in one or more states, or the District of Columbia, and who for not fewer than three years out of the immediately preceding five years, has practiced law, in good standing, by representing a client or clients or who has engaged in the full-time teaching of law at a law school approved by the American Bar Association, or who has been engaged full time as a judge, shall be admitted to practice in any state without further examination as to his or her knowledge of the law, provided that such attorney has received a J.D. or LL.B. degree from a law school approved by the American Bar Association and complies with all other applicable requirements for admission in the jurisdiction in which application for admission is made.

ABA, Reports with Recommendations to the House of Delegates (Aug. 11-12, 1981).

The major modifications in the text of the original Young Lawyers Division draft include (1) the requirement that the original admission be by examination, rather than diploma privilege, (2) a more specific definition of activities that constitute practice of law to satisfy the experience standard, and (3) the requirement that the attorney have received his degree from an ABA-approved law school. These additional requirements

American Bar Association[48] and other bar organizations that have a special interest in bar admissions practices.[49] It is anticipated that the proposal will be considered by the House of Delegates of the American Bar Association at its next annual meeting.[50]

V. Effect of the Uniform Standard

The proposed Uniform Standard for Admission of Attorneys by Reciprocity would, if adopted in all jurisdictions, reduce barriers to multistate admissions.

A. Providing for Reciprocal Admission of Practicing Attorneys Among All Jurisdictions

The principal purpose of the proposed Uniform Standard is to encourage adoption of admission by reciprocity, without further examination, among all American jurisdictions. Placing the prestige of the American Bar Association behind the principle of reciprocity may encourage some of the jurisdictions that presently do not permit reciprocal admission to modify their position.[51]

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reflect the special interests of certain sections of the organized bar, particularly the ABA Section on Legal Education and Admission to the Bar, which has long advocated both abolition of the diploma privilege and requirement of graduation from an ABA-approved law school as a precondition for initial admission.

[48] The proposed Uniform Standard has been approved by the ABA Sections on Litigation, General Practice, Criminal Justice, Corporations, Banking and Business Law, Economics of Law Practice, and Legal Education and Admission to the Bar. *See* Transcript of Proceedings before the Annual Meeting of the ABA House of Delegates, Aug. 12, 1981 [hereinafter cited as Transcript of Proceedings].

[49] The proposed Uniform Standard has been endorsed by the National Conference of Bar Examiners and by the Federal Bar Association. *See* Braeman, *Nonresident Lawyers' Ties to Their Home Bars*, 28 Fed. B. News 45, 45 (1981).

[50] At its annual meeting in August 1981, the ABA House of Delegates, on a voice vote, failed to adopt the proposed Uniform Standard as ABA policy. ABA, Summary of Action Taken by the House of Delegates of the ABA 29 (Aug. 12, 1981). The proposal remains under active consideration and will again be presented to the House of Delegates by the Young Lawyers Division at its August 1983 meeting in Atlanta. Grannelli, *Reciprocity Restrictions are Easing*, Nat'l L.J., Feb. 7, 1983, at 24, col. 4.

[51] This reevaluation is already underway in several jurisdictions not presently recognizing reciprocal admission. These include Georgia, *see* Recommendation of the State Bar of Georgia, Young Lawyers Section (Mar. 12, 1981) (advocating the amendment of Rule 2-101 of the Rules and Regulations for the Organization and Government of the

B. *Elimination of the Mutuality Requirement*

The Uniform Standard extends reciprocal privileges to qualified attorneys from all other states and the District of Columbia, regardless of whether the other jurisdiction grants similar privileges to attorneys from the admitting jurisdiction.[52] The adoption of reciprocal admission in all jurisdictions would, of course, eliminate the need to consider these distinctions. But until all states abolish present restrictions or prohibitions on reciprocal admission, the Uniform Standard urges each state not to deny admission to otherwise qualified attorneys because of restrictive rules in their former states, over which rules the particular attorneys involved have little or no control.

C. *Uniform Length of Practice Requirement*

The proposed Uniform Standard requires three years as the minimum length of active practice before applying for reciprocal admission in another jurisdiction.[53] As pointed out above, the majority of states now recognizing admission by reciprocity require five years of practice before admission in the second jurisdiction. The Uniform Standard suggests that the length of practice requirement should be reduced to three years, which is now the requirement in six states.[54] Reducing the length of practice requirement is justified by the decreased disparity in the states' admission standards, which lessens the importance of a lengthy practice requirement to prevent circumvention of high initial admission standards.[55]

The three-year practice requirement would increase the mobility of attorneys, especially those in government practice, in the military, and in nationwide corporations. These attorneys have a special need to be able to relocate from their place of original admission after the initial phase of their careers, which

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State Bar of Georgia to permit admission by reciprocity), and New Hampshire, *see* 7 MARTINDALE-HUBBELL LAW DIRECTORY, NEW HAMPSHIRE LAW DIGEST 4 (1983).

[52] *See supra* note 47.

[53] *See supra* note 47.

[54] *See* Appendix, section 2.

[55] *See supra* notes 22-27 and accompanying text.

often lasts about three years.[56]

The Uniform Standard does not require that the three years of practice be in a single jurisdiction or solely within the state of initial admission. Requirements of this type have been a problem for corporate, military, and government attorneys whose legal careers involve practice in several different geographical areas.

The Uniform Standard does require that the years of qualifying practice be within the immediately preceding five-year period.[57] This requirement ensures that the qualifying practice will have occurred within a reasonably contemporary period, rather than at a remote point in time. The majority of states now recognizing reciprocal admission require that the qualifying practice must have occurred within a specified period.[58]

D. Definition of "Practice"

The Uniform Standard adopts a broad definition of "active practice," which would include not only traditional private practice but also representation of corporate, governmental, or military clients, full-time teaching in a law school, and service as a judge. The use of the general terminology "representing a client or clients" rejects narrow distinctions among categories of practice.[59]

E. Graduation From an ABA-Approved Law School

To avoid any circumvention of legal education requirements through reciprocal admission, the proposed Uniform Standard includes a provision that a reciprocity applicant must not only satisfy previous admission and length of practice requirements, but also he must be a graduate of an ABA-approved law school.[60] It is universally recognized that a bar examination, lasting two or three days, cannot completely test the legal prepara-

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[56] *See supra* notes 34-36 and accompanying text.

[57] *See supra* note 47.

[58] *See* Appendix, section 2.

[59] *See supra* note 47.

[60] This provision was inserted at the specific suggestion of the ABA Section on Legal Education and Admission to the Bar and the Association of American Law Schools.

tion of prospective attorneys. Therefore, in addition to written bar examinations, all admitting authorities require some formal legal education as a separate independent control to ensure that applicants are adequately prepared for admission to the bar. The vast majority[61] of state supreme courts and boards of bar admissions rely on the standards set by the ABA Section on Legal Education and Admission to the Bar to ensure that applicants have received adequate basic legal education before allowing them to take their respective bar examinations.[62] It can be argued that any requirement regarding legal education violates the principle that second admitting jurisdictions should respect the admission standards of the jurisdiction of initial admission. But the proposed restriction of admission by reciprocity to graduates of approved law schools should encourage wider acceptance of the proposed Uniform Standard by negating the fear that reci-procal admission can be exploited to avoid the legal education requirements for initial admission. This provision would actually have a minimal effect on the number of attorneys eligible for admission by reciprocity.[63]

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[61] *See supra* note 23.

[62] The requirement of graduation from an ABA-approved law school for admission has been sustained against constitutional attacks in several jurisdictions. *See, e.g.*, Rossiter v. State Bd. of Bar Examiners, Civ. Action No. 75-M-1397 (D. Colo. 1978); Moore v. Supreme Court, 447 F. Supp. 527, 531 (D.S.C. 1977), *aff'd. mem.*, 577 F.2d 735 (4th Cir.), *cert. denied*, 439 U.S. 984 (1978); Everly v. Alaska Bar Ass'n, 631 P.2d 480, 482 (Alaska 1981); LaBossiere v. Florida Bd. of Bar Examiners, 279 So.2d 288, 290 (Fla. 1973); *In re* Hansen, 275 N.W.2d 790, 798 (Minn. 1978), *appeal dismissed*, 441 U.S. 938 (1979); Wessel v. Pennsylvania State Bd. of Bar Examiners, No. 327, Misc. Docket 21 (Pa. Jan. 4, 1979), *appeal dismissed*, 442 U.S. 907 (1979). *See generally* Dosher v. Supreme Court, 658 F.2d 1045, 1052-54 (5th Cir. 1981) (applicant for bar exam must be graduate of school on either ABA or Texas Supreme Court list of approved schools, but all on Texas Court's list are ABA accredited).

In Lane v. West Virginia State Bd. of Law Examiners, 295 S.E.2d 670, 674-75 (1982), the West Virginia Supreme Court sustained denial of admission by reciprocity to a graduate of a non-ABA-approved law school, admitted to practice in California, under a rule limiting reciprocal admission to attorneys from states whose admission standards are substantially the same as those in West Virginia.

[63] Of the 42,382 new attorneys admitted to practice in the United States in 1981, only 1,334 (978 of these in California) had graduated from non-ABA-approved law schools. This represented only 3.1% of all new admittees nationally. Smith, *supra* note 22, at 25-27, 31.

F. Initial Admission by Examination

The Uniform Standard also includes a provision that the reciprocity applicant must have been initially admitted by written examination.[64] This requirement would have the effect of denying reciprocal admission to attorneys originally admitted by diploma privilege.[65] Similar to the requirement of graduation from an ABA-approved law school, this restriction denies full recognition to the admission standards of those jurisdictions that accept graduation from the local state law school as satisfactory evidence of legal competency. It reflects the view that admission by reciprocity, even of experienced attorneys, should not provide an exception to the minimum standard for initial admission found in the majority of jurisdictions.[66] Nationally, this requirement would bar only a small number of attorneys being admitted at the present time from obtaining reciprocal admission.[67] This restriction would have a significant effect on the mobility of attorneys previously admitted in states, such as Mississippi, which in the past have granted the diploma privilege to graduates of in-state law schools.[68]

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[64] *See supra* note 47. Restrictions of this type presently exist in at least four jurisdictions: Alaska, Maryland, Texas, and West Virginia. *See* Appendix, note f.

[65] *See In re* St. Amour, 449 P.2d 673, 673 (Alaska 1969) (Montana graduate with diploma privilege not entitled to reciprocity in Alaska); *In re* Steelman, 448 P.2d 817, 819-20 (Alaska 1969) (same); Letter from William E. Collins, Chairman, Texas Board of Law Examiners, to the author (June 23, 1981) (Texas denies reciprocity based on diploma privilege).

[66] Since 1921, the official position of the American Bar Association has been that "graduation from a law school should not confer the right of admission to the bar, and that every candidate should be subject to an examination by public authority to determine his fitness." NAT'L CONFERENCE OF B. EXAMINERS, *supra* note 21, at 189.

[67] In 1981, only 940 of 42,382 new admittees (2.2%) were admitted by diploma privilege. Smith, *supra* note 22, at 31. The number of individuals admitted by diploma privilege will decline in the future because of its repeal in all jurisdictions except Wisconsin. *See supra* note 25.

[68] During the 1981 debate on the proposed Uniform Standard by the ABA House of Delegates, a representative of the Wisconsin Bar unsuccessfully moved for the deletion of the admission by examination requirement. *See* Transcript of Proceedings, *supra* note 48.

G. *The Uniform Standard Does Not Affect a State's General Admission Requirements*

The proposed Uniform Standard exempts qualified attorney—applicants only from the requirement of reexamination on their legal knowledge. The Uniform Standard specifically provides that reciprocity applicants must meet the same general requirements for admission as all other applicants in the admitting jurisdiction.[69] This would include satisfaction of the admitting jurisdiction's requirements concerning character and fitness.

It is unquestioned that to prevent admission of individuals likely to engage in unethical or dishonest conduct, each state in which reciprocal admission is sought should make a thorough, independent inquiry into the ethical qualities of the attorney-applicant, similar to the character investigation made of original applicants.[70] The Uniform Standard preserves the power of each admitting jurisdiction to require reciprocity applicants to meet the same general character standards as other applicants.

H. *Implementation*

Implementation of the Uniform Standard for Admission of Attorneys by Reciprocity will require action by appropriate authorities in the individual states. The nationwide adoption of the Uniform Standard will have its greatest effect in those states that presently do not recognize admission of attorneys from other jurisdictions without reexamination. Adoption of the Uniform Standard in those jurisdictions now permitting admission of experienced attorneys, without examination on different or more restrictive terms, would reduce barriers to multistate admission. This would particularly reduce barriers based on the length of practice after the attorney's initial admission and would eliminate the practice of conditioning admission, without reexamination, on the existence of reciprocal rules in the appli-

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[69] *See supra* note 47.

[70] The National Conference of Bar Examiners provides to state boards of bar admissions a central data bank and investigative services on reciprocity applicants. In 1979, over 7,000 background investigations of attorney-applicants were handled through this clearinghouse. NAT'L CONFERENCE OF B. EXAMINERS, *supra* note 21, at 170-78.

cant's former jurisdiction.

VI. Admission by Reciprocity in the Absence of Residency Requirements

Reciprocity has been an infrequently utilized method of admission.[71] It has been limited primarily to attorneys relocating the principal place of their practice. This is because most jurisdictions have required all persons admitted to the general practice of law, whether by examination or by reciprocity, to reside within the admitting jurisdiction.[72] Residency requirements have the practical effect of preventing an attorney from seeking admission in multiple jurisdictions while maintaining the principal place of his practice at its original location.[73] Residency requirements preclude admission by reciprocity from being used to establish a truly multistate practice.[74]

A. Constitutional Challenges to Residency Requirements

Although residency requirements for admission to practice law have been challenged on constitutional grounds, until recent years state regulation of admission to the bar was regarded as

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[71] *See infra* note 127.

[72] *See* Note, *A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV*, 92 Harv. L. Rev. 1461, 1461 (1979). Residency requirements have been categorized as (1) *simple* residency (required at the time of application, examination, or admission), (2) *durational* residency (required for a fixed period prior to application, examination, or admission), or (3) *continuing* residency after admission (required for continued good standing in the local bar). *Id.*

[73] An exception is the attorney practicing in a city located near a state border who may move his home and establish residency in an adjoining state while maintaining his practice in the state of original admission. Missouri, Texas, and Tennessee, states with metropolitan areas overlapping state borders, have accommodated this situation by requiring residency either in the state or within a limited area of adjacent territory. *See* Appendix, note u. These rules permit applicants living in multistate metropolitan areas to be admitted in adjoining states without relocating their homes.

[74] The proposed Uniform Standard makes no change in state residency requirements and does not address the issue whether the states can constitutionally require prospective attorneys to establish residency in the admitting jurisdiction. It simply requires that reciprocity applicants meet the same residency requirements, if any, as applicants for admission by other methods. *See supra* note 47.

essentially immune from judicial scrutiny.[75] The principal recognized exception to this immunity was that states could not exclude applicants from the practice of law in a manner that contravened the due process or equal protection clauses of the fourteenth amendment.[76] After the United States Supreme Court held that durational residency requirements to obtain certain types of governmental entitlements denied equal protection of the law to persons exercising their right to interstate travel,[77] residency requirements for admission to the bar were challenged on similar grounds. But with the exception of the decisions striking down rules requiring lengthy preadmission residency,[78] courts sustained, against equal protection and due process arguments, requirements that applicants reside in the admitting jurisdiction either shortly before or at the time of application or admission.[79]

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[75] Selling v. Radford, 243 U.S. 46, 50 (1917); *see also* Theard v. United States, 354 U.S. 278, 281 (1957) (Louisiana disbarments only narrowly open to federal court review).

[76] *See* Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957); *see also* Konigsberg v. State Bar, 353 U.S. 252, 262 (1957) (arbitrary denial of admission constitutes violation of due process and equal protection).

[77] *See, e.g.*, Memorial Hosp. v. Maricopa County, 415 U.S. 250, 269 (1974) (free hospital care denied unless one-year residency requirement is met); Dunn v. Blumstein, 405 U.S. 330, 360 (1972) (right to vote in state elections subject to durational residency requirement); Shapiro v. Thompson, 394 U.S. 618, 641 (1969) (must reside in jurisdiction for one year to receive welfare benefits). In each of these decisions, the Court, while striking down durational residency requirements for governmental benefits, suggested that simple residency at the time of application for the benefits would have been constitutionally acceptable. *Memorial Hospital*, 415 U.S. at 256; *Dunn* 405 U.S. at 348; *Shapiro*, 394 U.S. at 634-35.

[78] *See* Smith v. Davis, 350 F. Supp. 1225, 1229-30 (S.D. W. Va. 1972) (striking down on equal protection grounds one-year residency requirement for bar examination applicants); Lipman v. Van Zant, 329 F. Supp. 391, 401 (N.D. Miss. 1971) (same); Webster v. Wofford, 321 F. Supp. 1259, 1262 (N.D. Ga. 1970) (same); Kennan v. Board of Law Examiners, 317 F. Supp. 1350, 1358 (E.D.N.C. 1970) (same); *see also* Potts v. Honorable Justices, 332 F. Supp. 1392, 1398 (D. Hawaii 1971) (per curiam) (invalidating as having no rational connection to admission to practice law a requirement that applicant must have resided within Hawaii for at least six months at some time after age 15).

[79] *See* Aronson v. Ambrose, 479 F.2d 75, 77-79 (3rd Cir.) (upholding Virgin Islands' requirement of residency at time of admission but not reaching question of validity of territory's one-year durational residency requirement), *cert. denied*, 414 U.S. 854 (1973); Wilson v. Wilson, 416 F. Supp. 984, 987 (D. Or. 1976) (upholding Oregon's requirement that applicant state intention to be resident at time of admission), *aff'd mem.*, 430 U.S. 925 (1977); Shenfield v. Prather, 387 F. Supp. 676, 688 (N.D. Miss. 1974) (upholding requirements that applicants for admission by examination reside in Mississippi upon

These decisions were generally consistent with the contemporary status of residency requirements under the equal protection clause. The Supreme Court has not determined that short durational residency requirements violate the "fundamental right" to interstate travel, which would require strict scrutiny of any discrimination against an adversely affected class.[80] The Supreme Court has also indicated that residency is not a "suspect classification,"[81] thus eliminating an alternative ground for application of strict scrutiny review under the equal protection clause. In the absence of conditions necessitating strict scrutiny, state regulations may impose a special burden on a particular class if the distinction has a reasonable relationship to the purpose for which the classification is created.[82] Because admitting authorities have been successful in articulating plausible reasons why a prospective attorney should be required to reside in the state at least at the time of application or admission,[83] it is un-

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application and applicants for admission by reciprocity reside in Mississippi for six months prior to application); Brown v. Supreme Court, 359 F. Supp. 549, 554 (E.D. Va.) (upholding Virginia's requirements that attorneys applying for admission by reciprocity live and intend to practice full time in Virginia), *aff'd mem.*, 414 U.S. 1034 (1973); Tang v. Appellate Div., 373 F. Supp. 800, 801 (S.D.N.Y. 1972) (upholding New York's six-month preadmission residency requirement), *aff'd on other grounds*, 487 F.2d 138 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974); Kline v. Rankin, 352 F. Supp. 292, 294 (N.D. Miss. 1972) (upholding six-month requirement for reciprocity applicants and residence upon application requirement for examination applicants), *rev'd on other grounds*, 489 F.2d 387 (5th Cir. 1974); Suffling v. Bondurant, 339 F. Supp. 257, 260 (D.N.M.) (upholding New Mexico's six-month durational residency requirement), *aff'd mem. sub. nom.* Rose v. Bondurant, 409 U.S. 1020 (1972); *In re* Titus, 213 Va. 289, 191 S.E.2d 798, 801-02 (1972) (rule requiring permanent residency as prerequisite to bar admission upheld); *In re* Brown, 213 Va. 282, 191 S.E.2d 812, 815-16 (1972) (requirement of intent to practice full-time in state as prerequisite to admission to bar without examination upheld).

[80] *See* Note, *supra* note 72, at 1462-64 & nn.10-15.

[81] *See id.* at 1463 & n.13.

[82] *See* Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966); Baxstrom v. Herold, 383 U.S. 107, 111 (1966); Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[83] *See supra* note 79 and accompanying text. The reasons most commonly advanced for requiring bar applicants to live in the admitting jurisdiction have been summarized as follows:

> (1) convenience in administering the mechanics of the bar admission process—registration, testing, and interviewing; (2) the need to observe the prospective attorney's behavior and character; (3) the importance of general familiarity with local customs and court procedures; and (4) the facilitation of various interests served by the physical presence of the attorney within the

likely, as one commentator concluded, "that short durational and simple residency requirements would now be invalidated on equal protection grounds, because in most cases they will satisfy the minimum rationality level of review."[84]

A series of decisions in cases challenging Mississippi's residency requirements on equal protection grounds are representative of these cases nationally. *Lipman v. Van Zant*[85] dealt with a requirement that applicants for admission by examination reside in Mississippi for one year before their application.[86] Although recognizing that a residency requirement could be sustained against an equal protection challenge if it reasonably furthered a valid state interest, the three-judge court held that requiring twelve months preapplication residency had no rational connection with an applicant's fitness or competency to practice law.[87] The court agreed with the observation that lengthy preapplication residency requirements serve mainly to protect local lawyers and local law students against outside competition.[88] The court refused to sustain the one-year preapplication residency on the ground that it required applicants to exhibit a commitment to the community or on the basis of alleged administrative

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state, such as ease of service of process and attorney-client communication, availability for malpractice investigation and bar discipline, rapid response to motion calls, and simplifying the task of court appointments of counsel for indigent defendants.

Note, *supra* note 72, at 1480; *see* Note, *Residence Requirements for Initial Admission to the Bar: A Compromise Proposal for Change* 56 CORNELL L. REV. 831, 837-39 (1971) (discussion of residency requirements as barriers to initial bar admission).

[84] Note, *supra* note 72, at 1464.

[85] 329 F. Supp. 391 (N.D. Miss. 1971).

[86] *Id.* at 400. Prior to 1954, Mississippi had merely required bar examination applicants to reside in the state at the time of application. In 1954, as part of a general reform of bar admission standards, Mississippi for the first time required prospective attorneys to reside in the state for a full year before seeking admission by examination. Act of May 4, 1954, ch. 213, 1954 Miss. Laws 237 (codified at MISS. CODE ANN. § 73-3-13 (1972) (repealed 1979). In 1971, Mississippi's one-year residency requirement was as restrictive as that of any state in the nation. *See Lipman*, 329 F. Supp. 391, 400.

[87] 329 F. Supp. at 400-01.

[88] *Id.* at 401. The observation was made in Horach, *"Trade Barriers" to Bar Admissions*, 28 J. AM. JUDICATURE SOC'Y 102, 103 (1944), *quoted in* Keenan v. Board of Law Examiners, 317 F. Supp. 1350, 1359-60 (E.D.N.C. 1970). Within three years after Shapiro v. Thompson, 394 U.S. 618 (1969), federal courts had struck down one-year preadmission residency requirements for bar examination applicants in the handful of jurisdictions imposing these requirements. *See supra* note 78 and accompanying text.

convenience to the Board of Bar Admissions.[89] The court, however, did permit the Board to require applicants to reside in Mississippi at the time of application, because the applicant's physical presence presumably allowed the Board to conduct a character and fitness examination without using an out-of-state investigatory service.[90]

Subsequently, in *Shenfield v. Prather*,[91] the same three-judge court upheld Mississippi's six-month durational residency requirement[92] for attorneys applying for admission by reciproc-

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[89] Addressing these arguments, Chief Judge Keady stated:

> It is urged that the one-year residency requirement (a) encourages the applicant to have a stake in the community and have an interest in his own reputation, (b) enables the applicant to become familiar with local legal practice and the state's governmental structure, and (c) makes possible a more informed judgment as to the applicant's good moral character. We have no hesitancy in concluding that the one-year residency clause does not serve any of these objectives, nor was it designed to promote them. Indeed, in enforcing a prolonged period of "basking in the Mississippi sunshine" the one-year requirement is more apt to leave the recent law graduate without any means for obtaining "a stake in the community" and in a poor position to enhance his reputation as a useful member of the community. During the course of an unreasonably long residency period, the bar applicant, forced to remain a spectator and ineligible to participate, absorbs very little of the local legal practice and its customs merely by reason of proximity and often has slight, if any, contact with governmental procedures. Finally, although the need and desirability for having an informed judgment as to the applicant's moral character justifies a reasonable residency requirement, we conclude that an excessively long period of time, like one year, prior to applying for admission, is an arbitrary and unreasonable requirement which serves no purpose other than inordinate delay. More likely, the harshness of the one-year requirement serves more to dissuade worthwhile applicants from considering practicing law in Mississippi than it does to exclude undesirable applicants.

329 F. Supp. at 400-01.

[90] *Id.* at 403-04. In Kline v. Rankin, 352 F. Supp. 292, 294-95 (N.D. Miss. 1972), *rev'd on other grounds*, 489 F.2d 387 (5th Cir. 1974), the district court reaffirmed *Lipman v. Van Zant* with respect to the requirement of residency at the time of application.

[91] 387 F. Supp. 676 (N.D. Miss. 1974).

[92] MISS. CODE ANN. § 73-3-25 (Supp. 1982). Prior to 1916, bar admissions in Mississippi were the responsibility of local courts, each of which set its own admission standards. In 1916, Mississippi created a state board to administer a written bar examination to prospective attorneys. Act of Mar. 7, 1916, ch. 107, 1916 Miss. Laws 140 (codified at HEMINGWAY'S CODE § 180 (1917) (repealed 1932). In 1920, an act was passed to exempt from this written examination attorneys admitted in other states who had practiced for five years and who met the other statutory requirements for admission. Act of Apr. 1, 1920, ch. 146, 1920 Miss. Laws 203 (current version at MISS. CODE ANN § 73-3-25 (Supp.

ity.[93] This decision was clearly influenced by Supreme Court dicta that simple residency at or shortly before the time of application, as opposed to lengthy waiting periods, does not impermissibly discriminate against persons who exercise their interstate right to travel.[94] Following its decision in *Lipman v. Van Zant*, the court found that administrative convenience to the Board in being able to obtain information on an applicant's character from local sources provided a rational basis to sustain on equal protection grounds a six-month preadmission residency requirement for attorneys from other jurisdictions.[95]

Despite the unsuccessful arguments based on the equal protection clause, during the past four years residency requirements for admission to the bar have been subjected to renewed, and generally successful, challenges[96] based on the privileges and immunities clause of article IV of the United States Constitution.[97] Since the 19th century, the privileges and immunities clause has been interpreted as prohibiting states from discriminating against another state's citizens who seek to engage in commercial occupations.[98] In the mid-1970's, the Supreme Court reaf-

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1982)). At that time, applicants were simply required to be residents of Mississippi after the time of application. HEMINGWAY'S CODE § 182 (1917). In 1944, the reciprocity statute was amended to require attorneys to reside in this state for two years prior to application. After the *Lipman* decision, this two-year residency requirement, apparently the longest of any state in the nation, was reduced to six months. Act of Apr. 4, 1974, ch. 510, 1974 Miss. Laws 677 (codified at MISS. CODE ANN § 73-3-25 (Supp. 1982)); *see Shenfield*, 387 F. Supp. at 681 n.8.

[93] 387 F. Supp. at 688.

[94] *See supra* note 77 and accompanying text.

[95] 387 F. Supp. at 688.

[96] *See infra* cases discussed in notes 106-111, 113-121, and accompanying text. *But see infra* cases discussed in note 112.

[97] The privileges and immunities clause provides, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

[98] *See* Toomer v. Witsell, 334 U.S. 385, 396 (1948). In *Toomer*, the first significant privileges and immunities case in the modern era, the Supreme Court, referring to the fundamental right of citizens to engage in "common callings," struck down unequal licensing fees for nonresident fishermen. *Id.* at 403; *see also* Ward v. Maryland, 79 U.S. (12 Wall.) 418, 432 (1871) (invalidating higher taxes imposed on out-of-state vendors); *cf.* Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869) ("It was undoubtedly the object of the [privileges and immunities clause] to place citizens of each state, upon the same footing with citizens of other states so far as the advantages resulting from citizenship in those states were concerned.").

firmed the doctrine that earning a living in one's chosen occupation is a "fundamental right" protected by the privileges and immunities clause.[99]

The standard of review applied to protection of fundamental rights of nonresidents in privileges and immunities cases is similar to strict scrutiny analysis applicable to discrimination against suspect classifications in equal protection cases. States may only discriminate against nonresidents under article IV, section 2, if the state interest served by the discrimination is "substantial." This standard requires proof that nonresidents constitute the "particular source of the evil" at which the regulation is aimed.[100] Even if the governmental interest is substantial, and thus permitting some degree of discrimination,[101] "there must be a reasonable relationship between the danger presented by the non-citizens as a class and the . . . discrimination practiced upon them."[102] The substantial relationship test permits disparate treatment of nonresidents only when the state's legitimate interest cannot be achieved by less discriminatory means.[103]

Because of the stringent standard required to sustain dispa-

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[99] *See* Hicklin v. Orbeck, 437 U.S. 518, 533-34 (1978) (statute giving Alaskan residents preference for employment in state's oil and gas industry deprived nonresidents of the "fundamental right" to engage in their chosen occupation in Alaska). In the same Term, the Court made clear that the privileges and immunities clause does not forbid every state regulation placing special burdens on nonresidents; rather, the clause protects only those inherent privileges of citizenship regarded by the Court as "fundamental." Baldwin v. Game & Fish Comm'n, 436 U.S. 371, 383, 388 (1978) (holding that a higher fee for hunting licenses for nonresidents does not abridge their fundamental rights). *But see* Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. PA. L. REV. 379, 386-89 (1979) (questioning whether full protection under article IV should be confined only to activities characterized as "fundamental rights.").

[100] Toomer v. Witsell, 334 U.S. 385, 398 (1948).

[101] The Court in Toomer v. Witsell, 334 U.S. 385 (1948), pointed out that although the privileges and immunities clause was not "absolute," *id.* at 396, prohibitions against discrimination against nonresidents could be overcome only by showing valid, independent reasons for the discrimination and that the degree of discrimination bore a close relationship to those reasons. *Id.*

[102] *Id.* at 399; *see* Hicklin v. Orbeck, 437 U.S. 518, 526 (1978).

[103] Hicklin v. Orbeck, 437 U.S. 518, 527-28 (1978). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-33, at 410 (1978) (discriminatory statute should be struck down if less restrictive alternatives are available).

rate treatment of nonresidents over rights protected by the privileges and immunities clause, the critical issue is the characterization of the regulated activity as affecting a "fundamental right." Traditional deference to state regulation of its local bar as a "learned profession" might once have provided a ground for distinguishing the "privilege" to practice law from the constitutionally protected right to pursue a "common calling." But in recent years, the Supreme Court has increasingly viewed the practice of law as a form of commercial activity. Thus, state regulation of the practice of law is now regarded as subject to the same constitutional limitations as regulation of other economic activity.[104]

The Supreme Court's characterization of the practice of law as a commercial activity suggested that the nearly universal exclusion of nonresidents from admission to the bar might now be considered a violation of fundamental rights protected by the privileges and immunities clause.[105] In *Gordon v. Committee on Character & Fitness*,[106] the New York Court of Appeals found that its own rules, requiring prospective attorneys to reside in New York for six months before taking the state bar examination and for six months immediately prior to the date of their actual admission, abridged the privileges and immunities of citizenship guaranteed to nonresidents of New York.[107] The starting point of the court's analysis was a restatement of the well—established function of the privileges and immunities clause:

> The principal purpose of the privileges and immunities clause, like the commerce clause, is to eliminate protectionist burdens placed upon individuals engaged in trade or commerce by con-

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[104] *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 787-88 (1975) (holding that fee schedules established by state bar association violated the Sherman Antitrust Act; rejected suggestions in prior cases that practice of law was not subject to same regulations as other commercial occupations); *see also* Bates v. State Bar, 433 U.S. 350, 389 (1977) (invalidating state imposed ban on advertising by lawyers).

[105] A seminal article in the *Harvard Law Review* recognized the potential result of the convergence between the revived privileges and immunities clause and the Supreme Court's new view of the legal profession. Note, *supra* note 72, at 1464-65.

[106] 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979).

[107] 397 N.E.2d at 1313-14, 422 N.Y.S.2d at 645-46.

> fining the power of a State to apply its laws exclusively to nonresidents . . . . In essence, the clause prevents a State from discriminating against nonresidents merely to further its own parochial interests or those of its residents . . . . While the precise reach of the clause must await clarification, it is settled that a State may not premise an individual's right to engage in his chosen occupation within its borders solely on residence. Thus, the clause has been consistently interpreted to prevent a State from imposing discriminatory burdens on nonresidents . . . . [108]

The court then found the practice of law to be a form of economic activity protected by article IV, stating:

> No extended discussion is necessary to demonstrate that the right to pursue one's chosen occupation free from discriminatory interference is the very essence of the personal freedom that the privileges and immunities clause was intended to secure . . . . It is now beyond dispute that the practice of law, despite its historical antecedents as a learned profession somehow above that of the common trades, is but a species of those commercial activities within the ambit of the clause . . . . From the standpoint of both the public and the legal profession itself, the practice of law is analogous to any other occupation in which an independent agent acts on behalf of a principal.[109]

Although *Gordon* involved a six-month durational residency requirement for bar examination applicants, its expansive language represented a complete rejection of residency requirements as a condition for admission to the bar, whether upon examination or reciprocity.[110] Consistent with its decision in *Gordon*, the New York Court of Appeals immediately amended its rules to eliminate all residency requirements.[111]

Between 1978 and 1980 three United States District Courts

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[108] 397 N.E.2d at 1311-12, 422 N.Y.S.2d at 643-44.

[108] 397 N.E.2d at 1312, 422 N.Y.S.2d at 644-45.

[110] *See* Ashman, *Residency Requirements for Admission to the Bar: Gordon and Its Progeny*, 51 B. EXAMINER, Feb. 1982, at 10, 13-14 (*Gordon*'s expansive language indicates rejection of all residency requirements).

[111] Rules of the New York Court of Appeals for the Admission of Attorneys and Counselors at Law, 22 N.Y.C.R.R. § 520 (amended Nov. 20, 1979); *see* Ashman, *supra* note 109, at 14.

declined to overturn residency requirements on privileges and immunities grounds,[112] but since 1980 every state and federal court confronted with the issue has held that residency requirements for admission to the bar indeed abridge the constitutionally-guaranteed privileges and immunities of nonresident applicants.[113]

While most of the decisions striking down residency requirements have concerned applicants for admission by examination, *Stalland v. South Dakota Board of Bar Examiners*[114] involved an application by a nonresident attorney eligible for

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[112] Shortly before the Supreme Court decision in Hicklin v. Orbeck, 437 U.S. 518 (1978) the district court in Maryland found that admission of nonresidents to the practice of law was not entitled to article IV protection. Golden v. State Bd. of Law Examiners, 452 F. Supp. 1082, 1093-95 (D. Md. 1978), *appeal dismissed*, 614 F.2d 943 (4th Cir. 1980). The appeal of this case was dismissed as moot after Maryland changed its rules to permit nonresidents to sit for its bar examination. 614 F.2d at 944. The Fourth Circuit noted, however, the possible effect of *Hicklin* and *Gordon* on the lower court's decision. 614 F.2d at 945. After further litigation, Maryland repealed its remaining requirement that a successful examinee become a resident by the time of admission. Hayes v. Court of Appeals, Civil Action No. M-81-223 (D. Md.); *see* 51 B. EXAMINER, May 1982, at 40.

Shortly after *Gordon*, a district court in Wisconsin upheld Wisconsin's residency requirements for bar examination applicants. Canfield v. Wisconsin Bd. of Attorneys Professional Competence, 490 F. Supp. 1286, 1291 (W.D. Wis. 1980), *vacated and remanded*, 645 F.2d 76 (7th Cir. 1981). Although the district court stated that it found the New York Court of Appeals' analysis in *Gordon* persuasive, the court concluded that the memorandum affirmance by the Supreme Court in Wilson v. Wilson, 430 U.S. 925 (1977), *aff'g* 416 F. Supp. 984 (D. Ore. 1976), was binding on the constitutional issue involved. 490 F. Supp. at 1290-91. The appeal of this case was vacated as moot when the Wisconsin Supreme Court abolished that state's residency requirement. 645 F. 2d at 76.

In an unreported opinion, the District Court for the Eastern District of Missouri, citing *Wilson* and *Canfield*, upheld Missouri's requirement that attorneys must be residents at the time of admission. Peel v. Missouri, Civil Action No. 80-0406C(4) (E.D. Mo. July 11, 1980), *appeal dismissed sub. nom.* Peel v. Supreme Court, No. 80-1792 (8th Cir. April 9, 1981) (case dismissed as moot after Supreme Court of Missouri decided that Peel was qualified for admission).

Thus, none of these decisions resulted in a final determination contrary to the analysis of the privileges and immunities issue represented by *Gordon*.

[113] *See* Piper v. Supreme Court, 539 F. Supp. 1064, 1074-75 (D.N.H. 1982); Stalland v. South Dakota Bd. of Bar Examiners, 530 F. Supp. 155, 162 (D.S.D. 1982); Strauss v. Alabama State Bar, 520 F. Supp. 173, 179 (N.D. Ala. 1981); Noll v. Alaska Bar Ass'n, 649 P.2d 241, 246 (Alaska 1982); Sheley v. Alaska State Bar, 620 P.2d 640, 646 (Alaska 1980); Sargus v. West Virginia Bd. of Law Examiners, 294 S.E.2d 440, 446 (W. Va. 1982).

[114] 530 F. Supp. 155 (D.S.D. 1982). Stalland was a member of the Minnesota Bar who, while intending to maintain his residency and practice in Minnesota, sought admission for the general practice of law in the adjoining state of South Dakota. *Id.* at 157.

admission by reciprocity.[115] In *Stalland*, the defendants suggested several grounds for upholding statutes limiting admission of foreign attorneys to those who relocate their place of residence to South Dakota. First, the Board argued that the application of nonresident attorneys burdened the admission process and that the practice of law by nonresident attorneys would create administrative and scheduling problems for state courts. Following decisions involving strict scrutiny of regulations that affect fundamental rights, the court unhesitantly found that administrative inconvenience does not constitute sufficient reason to completely exclude nonresidents from admission to the bar.[116] Second, the Board suggested that out-of-state attorneys might fail to provide competent legal representation because of their inability to stay abreast of "rapidly changing" state laws and lack of familiarity with the attitudes, personalities, and opinions of local judges and jurors. The court found that although competency and familiarity with the local legal system are a legitimate state concern, nonresident attorneys do not present a "particular source" of problems in this area.[117] Finally, the Board's primary justification for its residency requirement was the alleged need for direct control and supervision over attorneys by local courts. The Board argued that attorneys residing outside the state's boundaries might not be available for service of process, bar discipline, or malpractice investigation. The

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[115] *Id.*

[116] *Id.* at 159.

[117] *Id.* at 159-60. The court pointed out the inconsistency in the defendants' position that physical residency was essential to ensuring the competency of newly admitted attorneys and the lack of rules requiring continuing residency or practice by attorneys once admitted. *Id.* at 160. Indeed, no state now appears to require continuing residency as a condition for maintaining a license to practice law. The universal absence of these requirements considerably weakens the argument that physical presence of licensed attorneys is a critical state concern. *See* Piper v. Supreme Court, 539 F. Supp. 1064, 1072 (D. N.H. 1982) (continuing residency not required); *cf.* Brown v. Supreme Court, 359 F. Supp. 549, 554 (E.D. Va. 1973) (attorneys admitted by examination not disqualified by changing residency, but attorneys admitted by reciprocity must remain residents to retain Virginia license). Mississippi allows admitted attorneys who become nonresidents to retain their local license. In 1982, 572 of 4746 members in good standing in the Mississippi State Bar resided outside this state. Letter from J. Stephen Wright, Special Assistant Attorney General of Mississippi, to the author (June 21, 1982) (quoting Larry Houchins, Executive Director of the Mississippi State Bar Association).

court recognized the state's valid interest in control and discipline of attorneys. Modern communication and transportation facilities, however, make nonresident attorneys as available for appearances before local courts as those with offices elsewhere within the same state. The district court noted that service of process and financial responsibility laws provided alternatives to residency by which a state could ensure the responsibility of nonresident attorneys for their performance. In view of the alternative methods of protecting the public that are less burdensome on nonresidents than total exclusion, the court found that the perceived dangers from admission of nonresident attorneys were insufficient to justify their blanket exclusion.[118]

It would be difficult to predict the ultimate outcome of the current battle over residency requirements. But the clear trend of decisions indicates that either by judicial mandate[119] or by voluntary repeal,[120] the individual states in the near future will no longer include residency as a requirement for admission to the general practice of law.[121]

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[118] 530 F. Supp. at 160-161.

[119] Residency requirements have been invalidated by judicial decision in at least six states, New York, Alaska, Alabama, South Dakota, New Hampshire, and West Virginia. *See supra* notes 106, 113.

[120] Residency requirements have been repealed in response to judicial challenges in Maryland and Wisconsin. *See supra* note 112. Voluntary repeals have occurred or are under consideration in a number of other states. *See* Ashman, *supra* note 110, at 13-15. Residency require-ments in Nebraska were abolished in 1982. 51 B. EXAMINER, May 1982, at 40.

[121] Mississippi has recently joined the states repealing residency requirements, at least insofar as bar examination applicants are concerned. After being advised by the state attorney general's office that present residency requirements are probably indefensible against constitutional attack, the Mississippi Board of Bar Admissions recommended to the Mississippi Legislature that the residency requirement for applicants for admission by examination be deleted from MISS. CODE ANN. § 73-3-2 (1972) upon reenactment. MISSISSIPPI BOARD OF BAR ADMISSIONS, PRELIMINARY STATEMENT FOR LIMITED PROGRAM EVALUATION PURSUANT TO MISSISSIPPI AGENCY REVIEW ACT OF 1978 AS AMENDED at 5-7 (1982); PEER COMMITTEE, LIMITED PROGRAM EVALUATION OF THE MISSISSIPPI STATE BOARD OF BAR ADMISSIONS at 9-10 (1982). This recommendation is incorporated into section 1 of Senate Bill 2398, which was passed by the Mississippi Legislature and approved by the Governor on April 1, 1983. The residency requirement for applicants for admission by examination in Mississippi has also been deleted from RULES GOVERNING ADMISSION TO THE MISSISSIPPI STATE BAR, Rule V, § 1. Miss. Sup. Ct. Order of Jan. 26, 1983, Misc. No. 1008. The requirement for six-months residency for admission by reciprocity was not modified upon reenactment of MISS. CODE ANN. § 73-3-25 (Supp. 1982).

B. *The Effect of Elimination of Residency Requirements on Admission by Reciprocity*

From a practical standpoint, elimination of residency requirements is not likely to have a major effect on the frequency of admissions to the bar by examination. The examination constitutes a substantial and time—consuming barrier to multiple admission,[122] and deters an attorney who is not planning to practice on a substantial or full-time basis in the examining jurisdiction from seeking admission.[123]

In contrast to admission by examination, the standard requirements, other than residency, for admission by reciprocity—initial admission, length of practice, and current good standing[124]—can be satisfied simultaneously in a large number of jurisdictions. In the absence of barriers to application by nonresidents, virtually all practicing attorneys, with over three to five years of experience, could meet the requirements for admission without examination in the thirty-two jurisdictions now recognizing admission by reciprocity.[125] Thus, the removal of residency requirements in states recognizing admission by reciprocity potentially presages a new era in which reciprocal admission may permit an established attorney to create a multistate practice and maintain his principal office at its original location.

S. 2398 § 2 (1983).

[122] The timing of state bar examinations forms a practical barrier to multistate admission. Because bar examinations are now administered on the same dates in virtually all jurisdictions—to coincide with the biannual dates of the nationwide administration of the Multistate Bar Examination on the last Wednesday in February and July—it is physically impossible for an applicant to sit for more than two separate state examinations in one calendar year.

[123] Attorneys relocating their principal place of practice usually also relocate their principal residence. These attorneys may be deterred both by requirements for reexamination on their legal knowledge and by lengthy preadmission residency requirements, which can require them to endure a period of enforced inactivity while satisfying the waiting period in a new jurisdiction in which they are not qualified to practice law. *See* Lipman v. Van Zant, 329 F. Supp. 391, 401 (N.D. Miss. 1971) (one-year residency requirement forces applicant "to remain a spectator"). But relocating practitioners are generally not adversely affected by requirements of simple residency at the time of admission.

[124] *See supra* notes 9-10 and accompanying text.

[125] *See* Appendix, section 1.

The prediction that elimination of residency requirements will have a more dramatic effect on admission by reciprocity than on admission by examination is supported by the comparasion of the relative frequency of admissions by reciprocity in jurisdictions with and without residency requirements. Admission by reciprocity has been relatively rare in jurisdictions that have permitted admission of experienced attorneys, without reexamination, but that have also required either actual residency or its near equivalent, such as establishment of the attorney's principal office.[126] In the most recent years for which complete statistics on bar admissions are available, only 6.4% of all new admissions nationally have been by reciprocity.[127] In contrast, in the

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[126] Residency requirements in states currently recognizing reciprocal admission either without reexamination or upon special attorney's examination are set forth in Appendix, section 5.

[127] Total admissions to the bar by source in all jurisdictions from 1975 through 1981, with the equivalent data for Mississippi, were as follows:

	Admissions By Examination	Admissions By Diploma Privilege	Admissions By Reciprocity*	Total Admissions
		All Jurisdictions		
1975	34,144	786	2104	37,034
1976	34,951	790	2741	38,482
1977	36,463	839	2504	39,806
1978	38,319	767	2795	41,881
1979	41,903	853	3350	46,106
1980	41,105	892	3100	45,097
1981	41,442	940	2197	44,579
Total	268,327	5867	18,791	292,985
Percentage	91.6%	2.0%	6.4%	
		Mississippi		
1975	59	161	6	226
1976	53	133	6	192
1977	94	171	1	266
1978	152	172	3	327
1979	137	152	3	292
1980	116	180	5	301
1981	105	237	4	346
Total	716	1206	28	1950
Percentage	36.7%	61.9%	1.4%	

*Includes admissions by special attorney's examinations.

Admission to Bar by States, 51 B. EXAMINER, May 1982, at 31; 48 B. EXAMINER 120-21 (1979).

District of Columbia, the sole American jurisdiction that has admitted attorneys by reciprocity without examination and that has not required applicants to establish local residency, the number of attorneys admitted by reciprocity exceeds the number admitted by examination.[128] In recent years, the District of Columbia, which averages about three percent of the nation's admission by examination, has accounted for sixty-one percent of all admissions by reciprocity.[129] The frequency of admissions by reciprocity in the District of Columbia may be influenced in part by the District's status as a national legal center, which makes the District especially attractive for relocating attorneys who actually move to the Washington area and could therefore satisfy residency requirements if they existed. But the volume of admissions by reciprocity in the District can only be explained by the absence of residency requirements that allow attorneys who have no intention of relocating their homes and principal places of practice in the District of Columbia area to be freely admitted to its bar on motion. While the District of Columbia is not a typical jurisdiction, its experience with respect to the frequency of reciprocal admission, in the absence of residency re-

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[128] From 1975 through 1981, there were 19,772 new attorneys admitted to practice in the District of Columbia; 11,456 were admitted by reciprocity (57.9%) and 8316 were admitted by examination (42.1%). During this same period, no other jurisdiction reported admissions by reciprocity in excess of 10% of total admissions. Admissions by reciprocity in Mississippi have not exceeded 3% of total admissions in any one year. *See* Smith, *supra* note 22, at 31; 48 B. EXAMINER 120, 120 (1979).

[129]

	Admissions by Reciprocity in D.C.	Admissions by Reciprocity (inc. by spec. Attorney exam) in all other jurisdictions	Total Admissions by Reciprocity
1975	1162	942	2104
1976	1467	1274	2741
1977	1478	1026	2504
1978	1923	872	2795
1979	2396	954	3350
1980	2038	1062	3100
1981	992	1205	2197
Total	11,456	7335	18,791

See Smith, *supra* note 22, at 31; 48 B. EXAMINER 120, 120 (1979).

quirements, is instructive of what may occur in other jurisdictions.

Admission by reciprocity, in the absence of residency requirements, would be attractive to attorneys interested in providing legal services on a regular basis throughout a multistate area. This admission would be particularly advantageous to house counsel for multistate corporations, members of law firms with offices in several states, and experts in litigation and in other specialized fields.

The potential competition from such specialists may be perceived as an economic threat to local general practitioners, who are now protected against out-of-state competition by residency requirements. It is possible that some states may react to invalidation of residency requirements by repealing admission by reciprocity completely and requiring all newly admitted attorneys to take a bar examination. Requiring that all applicants, without respect to their residency or previous admission in other jurisdictions, demonstrate their legal proficiency through a bar examination would not violate the privileges and immunities clause.[130]

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[130] Hawkins v. Moss, 503 F.2d 1171, 1179 (4th Cir.), *cert denied*, 420 U.S. 928 (1974). The Fourth Circuit concluded that requiring a migrant attorney, who was previously admitted in another state, to take the same bar examination as all other applicants did not violate the privileges and immunities clause. The court of appeals stated:

> The basic thrust of that section is to prevent "a state from discriminating against citizens of other states in favor of its own," Hague v. C.I.O., (1939) 307 U.S. 496, 511, 59 S. Ct. 954, 962, 83 L. Ed 1423. So long, then, as the State does not subject the migrant attorney, seeking the right to practice in the State, to no more onerous requirements than those imposed on its own citizens seeking such right, it cannot be said that the State has violated the section. The obligation, from compliance with which the plaintiff seeks by this action to be excused, is exactly the same obligation imposed indiscriminately by the State, through its Supreme Court, upon its own citizens in the same position as the plaintiff.

503 F.2d at 1179-80.

But repeal of reciprocity, if motivated by economic protection of the local bar, could be subject to critical scrutiny as a violation of federal antitrust laws. *See* Ronwin v. State Bar, 686 F.2d 692, 696 (9th Cir. 1982) (admissions committee not protected with blanket immunity from antitrust laws); *see also* Goldfarb v. Virginia State Bar, 421 U.S. 773, 791-92 (1975) (bar cannot foster anticompetitive practices). *But cf.* Feldman v. Gardner, 661 F.2d 1295, 1308 (D.C. Cir. 1981) (regulation by court of appeals of admission to bar involves a sovereign act producing immunity from federal antitrust liability), *cert. denied*, 102 S.Ct. 3483 (1982) (antitrust claims), *vacated and remanded on other grounds*, 51 U.S.L.W. 4285 (U.S. Mar. 23, 1983).

Although adverse reaction to admission of nonresident attorneys may be anticipated, the benefits of admission by reciprocity should be sufficiently recognized in jurisdictions with a tradition of admission on motion, so that this method of admission will not be repealed simply because it may be more frequently utilized.[131] Actually, none of the states that have recently eliminated residency requirements have repealed their rules permitting reciprocal admission of out-of-state attorneys.[132]

C. *Alternatives for Regulating Practice by Nonresident Attorneys*

Aside from fear of increased economic competition for the local bar,[133] the admission of large numbers of nonresident attorneys to the general practice of law by reciprocity may be viewed with apprehension by local admitting and disciplinary authorities who anticipate that nonresident attorneys will be less subject to personal observation by local courts and bar members. Because of a lack of identification with the community, nonresi-

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[131] At least four states, Illinois, Ohio, Massachusetts, and Michigan, and possibly a fifth, Iowa, require residency for attorneys admitted on motion but not for bar examination applicants. Ashman, *supra* note 110 at 11-12. Mississippi had recently joined this list of states. *See supra* note 121. Such a distinction may be rationalized on the basis that bar examination applicants must affirmatively demonstrate their knowledge of local law through the written test, but reciprocity applicants are not formally tested in the second admitting jurisdiction. Therefore, reciprocity applicants might be required to absorb some familiarity with the local legal system by living in the jurisdiction. It is unlikely that this distinction between admission by examination and admission by reciprocity has constitutional significance. As one commentator pointed out, "Simple and durational requirements for motion applicants may be no more efficacious in promoting [familiarity with the local legal system] than are [residency] requirements for examination applicants." Note, *supra* note 72, at 1483-84. None of the recent decisions striking down residency requirements have recognized a distinction between admission by examination and admission by reciprocity.

[132] Of the nine states whose residency requirements have been invalidated by judicial action or voluntary repeal after the *Gordon* decision, see *supra* notes 119-120, five, New York, Nebraska, South Dakota, Wisconsin, and West Virginia, have continued to admit attorneys by reciprocity without reexamination and two, Alaska and Maryland, have continued to administer special examinations for previously admitted attorneys. The remaining two states, Alabama and New Hampshire, are historically "non-reciprocity" states. *See* Appendix, section 1.

[133] *See* Young, *supra* note 1, at 112.

dents may not be subject to informal pressures over maintaining their legal skills and avoiding unethical practices to the same degree as local practitioners. Furthermore, the financial assets of nonresidents are more likely to be beyond the reach of local legal process in malpractice suits brought by injured clients.[134]

Unquestionably, states do have a valid interest in protecting their citizens against possible financial loss caused by dishonest or incompetent practitioners, whether resident or nonresident. The problems with competency, discipline, and financial responsibility presented by non—resident attorneys are not unique to this group and cannot justify their complete exclusion.[135] There are several less restrictive alternatives for ensuring disciplinary and financial responsibility of nonresident attorneys. The communication of nonresident attorneys with clients, the courts, and disciplinary authorities can be achieved by requiring all licensed attorneys to maintain a regularly staffed office within the state[136] or, at a minimum, to appoint a local agent for service.[137] Concern

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[134] *See* Note, *The Future of State Bar Residence Requirements Under the Privileges and Immunities Clause*, 26 S.D.L. REV. 79, 84-85 (1981) (rationale for residency requirements).

[135] This issue has been fully considered in *Gordon* and its progeny. *See supra* notes 112-113 and accompanying text; *see also* Note, *supra* note 133, at 81-90 (discussion of *Gordon* and its effect on residency requirements); Simson, *supra* note 99, at 389-92 (residency requirements fail to protect public or facilitate the administration of justice).

[136] In lieu of residency, New York, New Jersey, and Pennsylvania require all attorneys to maintain either a domicile *or* an active office for the practice of law within those states. *See* N.Y. JUDICIARY LAW § 470 (McKinney 1983); N.J. S. CT. R. 1:21-1(a); PA. BAR ADMISSION R. 203. The requirement that a multistate practitioner maintain an office in each state of admission does not offend the privileges and immunities clause as long as substantially the same requirement is imposed on resident attorneys. White River Paper v. Ashmont Tissue, Inc., 110 Misc. 2d 373, 441 N.Y.S.2d 960, 963 (Civ. Ct. 1981) (sustaining the New York rule); *see In re* Sackman, 90 N.J. 521, 448 A.2d 1014, 1018-19 (1982) (modifying a rule adopted in 1981 requiring nonresident attorneys to maintain their *principal* office in New Jersey and residents only to maintain a *bona fide* office); *see also* Ashman, *supra* note 110, at 11-15 (domicile and office requirements can be retained despite elimination of residency requirement).

[137] Minnesota requires an applicant to be a resident of that state or maintain an office in the state or designate the clerk of the supreme court as an agent for service of process. RULES OF THE SUPREME COURT FOR ADMISSION TO THE BAR, 52 MINN. STAT. ANN. II.B. (West 1980). Even without designation of a resident agent for service, an attorney's activity that gives rise to client claims will subject him to process under the state long-arm statutes, which normally permit service on a designated local official as the statutory agent for persons doing business in the state or who have committed torts or have breached contracts with local residents. *See, e.g.*, MISS. CODE ANN. § 13-3-57 (Supp.

for providing financial protection to clients who may be injured by a dishonest or incompetent attorney can be achieved through mandatory malpractice insurance applicable to all licensed attorneys regardless of their place of residence.

The state also has a substantial interest in ensuring that all licensed attorneys remain abreast of current legal developments. This interest might be accommodated by a continuing practice requirement measured by a minimum volume of local work per year.[138] A more practical and efficient method for ensuring continued competency and familiarity with changes in substantive and procedural law is mandatory continuing legal education for all licensed attorneys.[139] A logical extension of mandatory continuing legal education would be periodic reexamination of all admitted attorneys for general competency or for certification in areas of specialty. Mandatory continuing legal education, periodic reexamination, and specialty certification represent reasonable alternatives to satisfy requirements that all attorneys, residents as well as nonresidents, maintain a reasonable standard of legal competence and familiarity with local practice requirements. Meeting these requirements on a periodic basis in each state of admission would ensure that admission by reciprocity would not be abused by attorneys who have only a casual interest in multistate practice. Requiring all licensed attorneys, including nonresidents admitted by reciprocity, to verify their continuing competency and familiarity with local substantive and procedural law would alleviate concerns that reciprocal ad-

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1982); *see also* Note, *Attorneys: Interstate and Federal Practice*, *supra* note 8, at 1715 (despite lack of residence, attorney still amenable to service of process).

[138] Note, *supra* note 72, at 1488. A requirement of "continuing practice" measured in billable hours per year performed within the subject jurisdiction would present substantial policing problems. For example, this requirement would, if enforced, result in disbarment of admitted attorneys who move, either temporarily or permanently, from the licensing jurisdiction, and it would eliminate the traditional practice, now followed in virtually all jurisdictions, of allowing these attorneys to remain members in good standing of the local bar. *See supra* note 117. Furthermore, it is also apparent from common experience that performance of a minimum number of billable hours annually within a jurisdiction may have little relevance to the attorney's general competence or familiarity with current legal developments.

[139] The American Bar Association has endorsed the concept of continuing legal education (CLE) and a number of jurisdictions have adopted mandatory CLE as a prerequisite for continued good standing.

mission could dilute the quality of the legal profession in states which have high standards, both for initial admission and for continuing practice.[140]

Conclusion

Admission of experienced attorneys from other jurisdictions without reexamination of their legal education demonstrated that most states are willing to accept initial admission in a sister jurisdiction, plus a fixed period of experience as a practicing attorney, as adequate evidence of legal competency. At present, admission by reciprocity is utilized primarily by attorneys who desire to relocate their principal place of practice during their careers. The proposed Uniform Standard for Admission of Attorneys by Reciprocity, now under consideration by the American Bar Association, would facilitate reciprocal admission by eliminating local idiosyncrasies and lowering the average length of practice requirements. Its nationwide implementation would cause a substantial change in the availability of reciprocal admission only in those states in which reciprocal admission without reexamination is not presently recognized. This proposal would benefit primarily relocating practitioners. As long as attorneys must satisfy residency requirements in each jurisdiction, admission by reciprocity does not provide an avenue for the establishment of a truly multistate practice.

On the other hand, the invalidation or repeal of residency requirements, now underway throughout the nation, does create the potential for a revolution in the availability and frequency of admissions by reciprocity. It is possible that the successful assault on the residency requirements may precipitate a wholesale repeal of admission by reciprocity. This would be an unfortunate and unnecessary result, because there are less restrictive alterna-

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[140] During the 1981 debate before the ABA House of Delegates on the proposed Uniform Standard of Admission of Attorneys by Reciprocity, it was suggested that the Uniform Standard specifically require attorneys admitted by reciprocity to satisfy local CLE requirements. *See* Transcript of Proceedings, *supra* note 48. Under the present text of the Uniform Standard, reciprocally admitted attorneys must meet both the regular requirements for admis-sion in the local jurisdiction. Thus, such attorneys would be required to meet local CLE requirements as long as these are administered on a *nondiscriminatory* basis to all licensed attorneys.

tives that would protect a state's legitimate interest in regulating the competency and integrity of licensed attorneys, but that would allow admission without reexamination of experienced attorneys who desire to practice on a regular basis in two or more states. Admission by reciprocity in the absence of residency requirements could create the opportunity for experienced attorneys to establish a multistate or nationwide practice of law.

SUMMARY OF STATE RULES ON ADMISSION BY RECIPROCITY

State	SECTION 1			SECTION 2	SECTION 3	SECTION 4				SECTION 5
						Activities Constituting "Practice of Law"				
	Reciprocity Without Exam	Reciprocity With Special Exam	No Reciprocity	Years of Prior Practice Required[c]	Special Requirements	(1) Gov't Practice	(2) Judicial Service	(3) Law School Teaching	(4) Military Practice	Required Residence for Admission By Reciprocity
ALA.			X[b]							N/A
ALASKA		X		5 of 7	f		No Specific Definition			None[j]
ARIZ.			X							N/A
ARK.	X			3 of 4	g		No Specific Definition			Upon Application
CAL.		X		4 of 6			No Specific Definition			None
COLO.	X			18 of 25[d] 8 of 10	g	X		X	X	Upon Application
CONN.	X			5			No Specific Definition			6 Months Before Application
DEL.		X		5	h		No Specific Definition			Upon Examination
D.C.	X			5 of 8[e]		X	X			None
FLA.			X							N/A
GA.			X							N/A
HAWAII			X[b]							N/A
IDAHO		X		5 of 7			X	X		Upon Application
ILL.	X[a]			5 of 7	g, h		No Specific Definition			Upon Admission
IND.	X			5 of 7	g, h		X	X		Upon Application[q]
IOWA	X			5 of 7				X	X	Upon Application
KAN.	X			5			No Specific Definition			Upon Application
KY.	X			5 of 7				X		r
LA.			X							

State	SECTION 1			SECTION 2	SECTION 3	SECTION 4				SECTION 5
						Activities Constituting "Practice of Law"				
	Reciprocity Without Exam	Reciprocity With Special Exam	No Reciprocity	Years of Prior Practice Required[c]	Special Requirements	(1) Gov't Practice	(2) Judicial Service	(3) Law School Teaching	(4) Military Practice	Required Residence for Admission By Reciprocity
ME.		X		3				X		Upon Application
MD.		X		5 of 7	f		X	X		None[r]
MASS.	X			5				X		Upon Application
MICH.	X			3 of 5				X	X	Upon Application
MINN.	X[a]			5 of 7	h	X	X	X	X	s
MISS.	X			5		X	X	X	X	6 Months Before Application
MO.	X			5	g	X		X		Upon Application[u]
MONT.	X[b]			2			No Specific Definition			6 Months Before Application
NEB.	X			5 of 10	g		No Specific Definition			None[p]
NEV.			X[b]							N/A
N.H.			X							N/A
N.J.			X[b]							N/A
N.M.		X[b]		5			No Specific Definition			90 Days Before Admission
N.Y.	X			5		X		X	X	None[k t]
N.C.	X			3 of 5		X	X	X	X	60 Days Before Application
N.D.	X			4 of 5	g	X	X	X	X	Upon Application
OHIO	X			5				X		Upon Admission
OKLA.	X[b]			5	h		X	X	X	Upon Application
OR.		X[b]		3 of 5	g		No Specific Definition			Upon Admission

State	SECTION 1			SECTION 2	SECTION 3	SECTION 4				SECTION 5
						Activities Constituting "Practice of Law"				
	Reciprocity Without Exam	Reciprocity With Special Exam	No Reciprocity	Years of Prior Practice Required[c]	Special Requirements	(1) Gov't Practice	(2) Judicial Service	(3) Law School Teaching	(4) Military Practice	Required Residence for Admission By Reciprocity
PA.	X			5	g	X		X		t
R.I.	X			5 of 10	i			X		Upon Application
S.C.			X[b]							N/A
S.D.	X			5			X	X	X	None[l]
TENN.	X			5	g			X		Upon Application[u]
TEX.	X			3			X	X	X	3 Months Before Application[u]
UTAH	X			3 of 5	f		X	X	X	3 Months Before Application
VT.	X			5 of 10	g	No Specific Definition				6 Months Before Application[u]
VA.	X			5		No Specific Definition				Upon Application
WASH.			X		g					N/A
W. VA.	X[b]			5		X			X	None[m]
WIS.	X			3 of 5	f	X	X	X	X	Upon Application
WYO.	X			5 of 8	h	No Specific Definition				None[o]
TOTALS:	32	8	11							

Chart's Footnotes

a Applicant must have passed multistate professional responsibility examination (MPRE).

b State makes provision for admission, without examination, for law professors at in-state law schools.

c Many states provide that the required years of practice in a former jurisdiction must be within a certain immediate preceding period; for instance, notation "5 of 6" indicates requirement that applicant must have practiced 5 of immediately preceding 6 years.

d Colorado permits admission without examination to attorneys with 18 years experience regardless of former state's requirements for admission but permits admission with 8 years experience if former state's requirements for admission are equal to Colorado.

e District of Columbia applies a lower practice requirement if the former jurisdiction requires less than 5 years practice.

f Alaska and Maryland require applicant to have passed a written bar examination in former state, therefore, attorneys admitted by diploma privilege do not qualify. Texas and West Virginia achieve the same result by requiring that the applicant must come from a state whose initial admission requirements are equal to the standards of those states.

g Admission without examination is available only to applicants from states that extend similar privileges to applicants from this state.

h Rules exclude admission by reciprocity of those who have previously failed this state's bar examination.

i Rhode Island has special provision for admission of attorneys admitted in other jurisdictions, without regard to time of practice, as long as they are employed by federally funded programs providing legal services to indigents.

j Alaska's residency requirements were held unconstitutional in Sheley v. Alaska Bar Ass'n, 620 P.2d 640, 645 (Alaska 1980) (30 days durational residency), and Noll v. Alaska Bar Ass'n, 649 P.2d 241, 242 (Alaska 1982) (simple residency).

k New York's six-month durational residency requirements were held unconstitutional in Gordon v. Committee on Character & Fitness, 48 N.Y. 2d 266, 273, 422 N.Y.S.2d 641, 645, 397 N.E.2d 1309, 1312 (1979).

l South Dakota's requirement of simple residency upon application was held unconstitutional in Stalland v. South Dakota Bd. of Bar Examiners, 530 F. Supp. 155, 162 (D.S.D. 1982).

m West Virginia's 30-day durational residency requirement was held unconstitutional in Sargus v. West Virginia Bd. of Law Examiners, 294 S.E.2d 440, 446 (W. Va. 1980).

n Maryland repealed its requirement of residency upon application after it was challenged in Golden v. State Bd. of Law Examiners, 452 F. Supp. 1082, 1094 (D. Md. 1978), *appeal dismissed as moot*, 614 F.2d 943, 945 (4th Cir. 1980), and its requirement of residency upon admission after further challenge in Hayes v. Court of Appeals, Civil Action No. M-81-223 (D. Md.).

o Wisconsin repealed its requirement of simple residency upon application after it was challenged in Canfield v. Wisconsin Bd. of Attorneys Professional Competence, 490 F. Supp. 1286, 1290 (W.D. Wis. 1980), *vacated as moot*, 645 F.2d 76 (7th Cir. 1981).

p Nebraska repealed its requirement of simple residency upon application on March 24, 1982.

q In addition to residence, Indiana requires the applicant to file an affidavit of intent to establish a law practice in Indiana within two years of admission.

r Kentucky requires applicant either to be resident of Kentucky or intend to perform "the major portion" of professional activities in Kentucky.

s Minnesota requires applicant either to be resident of Minnesota or to maintain office in Minnesota, or to designate Clerk of Minnesota Supreme Court as his agent for service of process.

t New York and Pennsylvania require all attorneys either to establish a domicile or a fixed office in the state.

u Missouri, Tennessee, and Texas require residency either within the state or in limited areas immediately adjoining the state border.

v Vermont requires attorney to apply by reciprocity to study for 6 months in office of Vermont attorney.

A PLEA FOR ADOPTION OF THE PROPOSED MISSISSIPPI RULES OF EVIDENCE

*Grady F. Tollison, Jr.**

I think we have lived long past the time when lawyers should have to be familiar with two road maps for travel in our system of justice. The mastery of one should be enough. Unless necessary for the protection of some vital state interest in the welfare of its own citizens on some specific subject, state rules should be conformed to the federal, eliminating the hazards of confusion and possible injustice. Changes do not come easily, even when they are meritorious, but that powerful negative force, inertia, should not be allowed to prevail on this extremely vital subject.[1]

Honorable J.P. Coleman

In August 1982, the Board of Bar Commissioners for the Mississippi State Bar filed a petition in the Mississippi Supreme Court seeking adoption by the court of uniform rules of evidence for use in Mississippi state courts.[2] The purpose of this article is to urge all members of the Mississippi legal community to support adoption of the proposed Mississippi Rules of Evidence, which are currently pending before the Mississippi Supreme Court.

Until adoption of the Mississippi Rules of Civil Procedure, practicing law in our state was "analogous to walking through a mine field,"[3] because attorneys were required to deal with a "hodge-podge of confusing, scattered statutes, court rules and case decisions."[4] One writer has compared compliance with the meaningless procedural formalities required under former prac-

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[1] Coleman, *Foreword* to *Symposium on Mississippi Evidence* (pt. 1), 48 Miss. L.J. 899, 899 (1977).

[2] *In re* Board of Bar Comm'rs, Misc. No. 1423 (Miss. Aug. 27, 1982).

[3] Abbott, *The Proposed Mississippi Rules of Civil Procedure—An Argument for Adoption*, 49 Miss. L.J. 285, 297 (1978).

[4] Franck, *Practice and Procedure in Mississippi: An Ancient Recipe for Modern Reform*, 43 Miss. L.J. 287, 287 (1972).

tice to Dicken's fog-bound High Court of Chancery.[5] These same observations apply to the present state of evidence law in Mississippi. The mass of material recently published on Mississippi evidence law is indicative of the doubt that pervades the bench and bar on innumerable evidentiary questions in this state.[6] There is scarcely a seminar by the Judicial College, the Mississippi State Bar, or the Mississippi Trial Lawyers Association at which evidence is not a part of the program.

Commentators advocated procedural reform for forty years[7] before Mississippi adopted modern discovery rules[8] and the new rules of civil procedure.[9] Procedural reform would be complete with the adoption of modern rules of evidence to replace the "hodge-podge" or "mine field" that presently exists. Uniform rules of evidence would also eliminate those areas of discretion that vary between circuit and chancery courts and districts in different parts of the state.[10] More important, uniform rules would assist the bench and the bar by resolving disputes without continually overburdening a crowded court system, bringing a prompt resolution to controversy, and, ultimately, better serving the public. It must be remembered that "the people's good is the

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[5] Patterson & Patterson, *A Plea for Procedural Reform in Mississippi*, 42 MISS. L.J. 293, 293 (1971).

[6] *See, e.g.*, Mason & Hengen, *The Hearsay Rule in Mississippi: "Out of the Presence of the Adverse Party—In the Presence of the Adverse Party,"* 47 MISS. L.J. 423, 424-34 (1976) (discussing Mississippi's deviation from traditionally recognized definitions of hearsay); Comment, *The Use of Prior Convictions for Impeachment in Mississippi*, 44 MISS. L.J. 509, 524 (1974) (noting potential for abuse in Mississippi's policy on the right of cross-examination about prior convictions); Comment, *Lay Opinion Testimony in Mississippi*, 43 MISS. L.J. 705, 711-16 (1972) (demonstrating confused and irrational development of Mississippi rules governing admissibility of lay witness testimony); 46 MISS. L.J. 192, 198-99 (1975) (outlining ambiguity in Mississippi Supreme Court's definition of integrated agreement); 43 MISS. L.J. 122, 122 (1972) (criticizing Mississippi Supreme Court's misapplication of hearsay rule); 42 MISS. L.J. 287, 287-92 (1971) (illustrating Mississippi Supreme Court's difficulty in defining res gestae); 41 MISS. L.J. 604, 608-11 (1970) (discussing Mississippi's shop book rule as clarified in King v. State *ex rel.* Murdock Acceptance Corp., 222 So. 2d 393 (Miss. 1969)).

[7] For a collection of articles advocating procedural reform in Mississippi, see *1981 Mississippi Supreme Court Review*, 52 MISS. L.J. 399, 401 n.6 (1982).

[8] MISS. CODE ANN. §§ 13-1-201 to -271 (Supp. 1982).

[9] Miss. Sup. Ct. Order of May 26, 1981, Miss. Cases 395-397 So. 2d 1 (1981).

[10] *Cf.* Smith & Ehrhardt, *Proposed Code of Evidence*, 48 FLA. B.J. 13, 13 (1974) (uniform evidence code would eliminate variation in local application of law of evidence).

highest law."[11]

This article briefly highlights noteworthy differences between the proposed Mississippi Rules and the Federal Rules of Evidence, but it will not extensively compare the Federal Rules with present Mississippi evidence law.[12] This article also discusses the origin of the proposed Rules and offers reasons why uniform rules would benefit the bench, the bar, and the public. In addition, this article indicates why the bar chose to petition the Mississippi Supreme Court to adopt the proposed Rules rather than seek comparable legislation.

I. Origins of the Proposed Mississippi Rules of Evidence

The petition of the Board of Bar Commissioners currently pending before the Mississippi Supreme Court urges adoption of a set of rules similar to the Federal Rules of Evidence.[13] The Mississippi Trial Lawyers Association has also petitioned the court to adopt the proposed Rules.[14] Although there was substantial controversy within the bar over the adoption of the Mississippi Rules of Civil Procedure, there is among the leadership of various segments within the bar significant support for the proposed Rules.

The petition to adopt the proposed Rules has been in the Mississippi Supreme Court since August and information concerning the petition has been widely disseminated to the bench and the bar.[15] No petitions opposing the proposed Rules have been filed with the court. The circuit judges and chancellors have been given an opportunity to review the proposed Rules

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[11] Cicero, De Legibus III 3, *reprinted in* J. Bartlett, Familiar Quotations 111 (1968).

[12] For a comparison of the Federal Rules of Evidence with the corresponding law in Mississippi, see *A Comparison of the Federal and Mississippi Rules of Evidence*, Thirty-Fifth Annual Mississippi Law Institute on Evidence (1980); *Symposium on Mississippi Evidence* (pt.1), 48 Miss. L.J. 899 *passim* (1977), (pt. 2), 49 Miss. L.J. 1 *passim* (1978).

[13] The proposed Mississippi Rules of Evidence are set forth in the appendix to this article. *See infra* pp. 66-10. The Federal Rules of Evidence are found at title 28 of the United States Code.

[14] Interview with William Liston, President of the Mississippi Trial Lawyers Association, in Jackson, Mississippi (Jan. 3, 1983).

[15] The author informed the state trial judges of the petition to adopt the proposed Rules in June 1982 at the Judges' Annual Conference.

and to offer their comments,[16] and have voiced no criticism of the proposed Rules.[17]

As previously stated, the proposed Rules are a slightly modified version of the Federal Rules. These modifications were the result of input from various sources within the bar. The final draft of the proposed Rules was the result of work done by the Judicial Liaison and Administrative Committee of the Mississippi State Bar.[18] The Judicial Liaison Committee began work on the proposed Rules with two sets of previously proposed rules, one of which had been introduced in the Mississippi Senate and the other in the Mississippi House of Representatives. In addition, it had the benefit of the preliminary work done by the now-defunct Advisory Committee on Rules of Civil Practice and Procedure for the Supreme Court of Mississippi,[19] which was composed of a cross-section of the Mississippi Bar,[20] and

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[16] The state's circuit judges assigned a committee to study the proposed Rules and to make appropriate comments on behalf of the circuit judges. Interviews with Circuit Judge Elzy Smith of the 11th Judicial District and Circuit Judge Niles McNeel of the 5th Judicial District, in Jackson, Mississippi (Sept. 24, 1982). The supreme court also has asked all state court judges to offer their comments on the proposed Rules. Interview with Chief Justice Neville Patterson of the Mississippi Supreme Court, in Jackson, Mississippi (Nov. 15, 1982). Circuit judges were asked in October 1982 to submit their comments to the supreme court through Circuit Judge McNeel. *Id.*

[17] The Court Education Program at the University of Mississippi Law Center conducted a survey by sending to 100 circuit judges throughout the state a copy of the proposed Rules and an accompanying questionnaire soliciting comments. None of the 100 judges voiced any opposition to the proposed Rules. Interview with Robert Doyel, Director of the Court Education Program of the Mississippi Judicial College, in Oxford, Mississippi (Jan. 24, 1983).

[18] In his 1981 State of the Judiciary Address, Chief Justice Neville Patterson challenged the Bar to create a committee to advise the supreme court on procedural rules. Patterson, *State of the Judiciary,* MISS. LAW., July-Aug. 1981, at 26. In response to the challenge, Honorable Leonard Melvin, then President of the Mississippi State Bar Association, instructed the Judicial Liaison and Administration Committee to serve as the court's advisory committee on rules. The Judicial Liaison and Administration Committee is composed of a geographical and philosophical cross-section of the Mississippi Bar.

[19] The first draft of the proposed Rules provided to the Mississippi Supreme Court by the Advisory Committee on Rules of Civil Practice and Procedure was later used by the Judicial Liaison Committee. Ultimately, the Advisory Committee ceased to function because of a lack of funding. Interview with Arlen Coyle, former Research Director for the Advisory Committee on Rules of Practice and Procedure for the Supreme Court of Mississippi, in Oxford, Mississippi (Jan. 24, 1983).

[20] *See* MISS. CODE ANN. § 9-3-65 (Supp. 1982) (providing for the composition of the advisory committee).

which had previously drafted *Mississippi Model Jury Instructions.*[21] With the Federal Rules of Evidence as the primary source,[22] the Judicial Liaison Committee prepared a draft for presentation to the Board of Bar Commissioners of the Mississippi State Bar. The Judicial Liaison Committee made a conscious, and unanimous, decision to follow closely the Federal Rules of Evidence whenever possible because the advantages of uniformity and previous experience under the Federal Rules would improve the judicial process.

The Judicial Liaison Committee unanimously approved the final draft presently before the supreme court. The proposed Rules were then presented to the Board of Bar Commissioners, which unanimously passed a resolution to either petition the Mississippi Supreme Court to adopt the proposed Rules or to present them to the legislature.[23] The petition was filed in the Mississippi Supreme Court on August 27, 1982.[24]

II. The Need for Comprehensive Rules of Evidence

Rules of evidence are "inextricably bound up with rules of procedure."[25] The original Advisory Committee on the Federal Rules of Civil Procedure recognized that a complete system of procedural rules should include rules of evidence.[26] Although Mississippi has adopted the Mississippi Rules of Civil Procedure and the Mississippi Rules of Criminal Procedure, its procedural scheme remains incomplete without companion rules of evidence. Mississippi attorneys are currently practicing under the same outdated conditions that existed in the federal arena and other state jurisdictions prior to their adoption of uniform rules. In determining what course of action to take on the proposed

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[21] Mississippi Circuit Court Judges Association & The Mississippi Judicial College, Mississippi Model Jury Instructions (1977).

[22] Members of the Judicial Liaison Committee representing the plaintiffs' bar sought concessions that would be advantageous to plaintiffs, and members of the defense bar sought concessions they perceived would favor defendants; as a compromise, both sides agreed upon the Federal Rules of Evidence as the basic format.

[23] Minutes of the Mississippi State Bar, June, 1982.

[24] *In re* Board of Bar Commr's, Misc. No. 1423 (Miss. Aug. 27, 1982).

[25] Spangenberg, *The Federal Rules of Evidence—An Attempt at Uniformity in Federal Courts,* 15 Wayne L. Rev. 1061, 1061 (1969).

[26] *Id.* at 1061-62.

Rules, Mississippi, fortunately, can look to the experience of those jurisdictions and the substantial body of literature that accompanied the enactment of uniform rules.

In 1939, the American Law Institute made the first attempt to draft a set of uniform rules of evidence. This effort eventually resulted in the publication of a Model Code of Evidence in 1942;[27] however, no jurisdiction adopted the Model Code. In 1953, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Rules of Evidence, which substantially revised the Model Code. Although the work of the National Conference of Commissioners received critical acclaim from judges, scholars, and lawyers, only five jurisdicitons enacted the Uniform Rules of Evidence.[28] California eventually adopted a code of evidence, which was based on the Uniform Rules, and which became effective on January 1, 1967.[29] Also in 1967, the New Jersey Supreme Court promulgated its own version of the Uniform Rules.[30]

The work on the Federal Rules of Evidence began in 1961 when Chief Justice Warren appointed a Special Committee on Evidence[31] to determine the feasibility and advisability of developing uniform rules of evidence for use in the federal courts.[32] The Special Committee was composed of judges and members of all segments of the bar throughout the United States.[33] The Federal Rules of Evidence, which apply to both criminal and civil proceedings in all federal courts, became effective on July 1, 1975.[34]

One of the strongest arguments favoring the adoption of

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[27] Morgan, *Foreword* to MODEL CODE OF EVIDENCE at 5 (1942).

[28] UNIF. R. EVID. Commissioners' prefatory note, 13 U.L.A. 214 (1980) (California, New Jersey, Kansas, Panama Canal Zone, Utah and Virgin Islands adopted original enactmet of uniform rules).

[29] *Foreword* to CAL. EVID. CODE, at iii (West 1967); *see* Spangenberg, *supra* note 25, at 1065 n.8 (citing 7 CALIFORNIA LAW REVISION COMMISSION, REPORTS, RECOMMENDATIONS AND STUDIES 4, 1007-08 (1965)).

[30] *See* J. WEINSTEIN, REFORM OF CORUT RULE-MAKING PROCEDUES 77-82 (1977) (describing adoption of New Jersey Rules of Evidence).

[31] *Id.* at 1067.

[32] *See id.* 1068-69 (listing members of the Special Committee).

[33] *Id.* at 1067.

[34] Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926, 1974 U.S. CODE CONG. & AD. NEWS (88 Stat. 1926) 2215, 2251.

rules based upon the Federal Rules of Evidence is the availibility of an authoritative body of literature that has developed from careful scrutiny of each of the Federal Rules.[35] In addition to this literature, twenty-two states have adopted variations of the Federal Rules;[36] thus, judges and lawyers in Mississippi could benefit from precedents developed in these states. With the extensive analysis of the Federal Rules and the experiences of other states as a guide, Mississippi can anticipate an orderly transition to practice under the proposed Rules.

The advantages of uniform rules are numerous, one of the most important being that a lawyer will be able to read the rules with some degree of assurance on how a judge will apply them. In a time when litigation is increasingly burdensome, it is essential that routine judicial rulings be predictable.[37]

Statistics reveal that approximately ninety-five percent of all civil tort cases are settled without trial.[38] It is apparent that when an attorney is able to predict with a fair degree of accuracy the manner in which the case will be presented to the jury, he can also weigh with greater accuracy the probabilities of what the verdict will be. This predictability is bound to result in more settlements. Rules of evidence will allow that prediction to be made with even greater accuracy by the practitioner.

The Federal Rules of Evidence have eliminated much of the

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[35] *See, e.g.*, D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE (1977 & Supp. 1982); 10 & 11 J. MOORE & H. BENDIX, MOORE'S FEDERAL PRACTICE (1982 & Supp. 1982-1983); J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE (1982); FEDERAL RULES OF EVIDENCE SERVICE (ed. Pike & Fischer, Inc. 1979); RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES (1981) (practice comments by Prof. Paul F. Rothstein); Powell & Burns, *A Discussion of the New Federal Rules of Evidence*, 8 GONZ. L. REV. 1 *passim* (1972); Tait, *The New Federal Rules of Evidence: A Summary of the Differences Between the Rules and the Connecticut Law of Evidence*, 9 CONN. L. REV. 1 *Passim* (1976) (comparing federal and state rules).

[36] ALASKA R. EVID.; ARIZ. R. EVID.; ARK. STAT. ANN. § 28-1001 (1979); COLO. R. EVID.; DEL. R. EVID.; FLA. STAT. ANN. §§ 90.101-.958 (West 1979); HAWAII REV. STAT. § 33-626-1 (1980 Spec. Pamp.); ME. R. EVID.; MICH. R. EVID.; MINN. R. EVID.; MONT. R. EVID.; NEB. REV. STAT. §§ 27-101 to -1103 (1979); NEV. REV. STAT. §§ 47.020-56.020 (1979); N.M. R. EVID.; N.D. R. EVID.; OHIO R. EVID.; OKLA. STAT. ANN. §§ 12-40-2101 to -3103 (1980); OR. EVID. CODE; S.D. R. EVID.; WASH. R. EVID.; WIS. STAT. ANN. §§ 901.01-911.02 (West 1975); WYO. R. EVID.

[37] *See* J. WEINSTEIN, *Preface* to WEINSTEIN'S EVIDENCE at iv (1982).

[38] *See* Groce, *Personal Injury Cases: Reaching Reasonable Settlements Before Trial and Minimizing Recovery at Trial*, 20 ARK. L. REV. 18, 18 (1966).

trial judge's discretion in ruling on evidentiary questions, thus removing a good deal of uncertainty as well. Obviously, it is difficult to negotiate a settlement in a lawsuit when a party cannot know whether he will prevail because his case is dependent upon the presentation of evidence, the admission of which is discretionary with the court. As a result, the public is better served and the pressure on an overburdened court system is reduced concomitantly.[39]

In addition, uniformity should reduce the number of appeals on evidentiary points.[40] It should also allow more information to reach a juror—a fact that would in itself increase respect for trial processes on the part of the public, the parties, the witnesses, and the jury.[41] Generally, relevant evidence will be excluded only when the evidence is unduly prejudicial, confusing, misleading, cumulative, or if admitting the evidence would constitute a waste of time.[42] Therefore, if an attorney can convince the judge that evidence, which traditionally may have been excluded, is nevertheless reliable, it may be admitted.[43]

Adoption of the proposed Rules would provide judges and lawyers with a convenient statement of the law of evidence available for immediate reference in the courtroom. Because of the amount of case law and other written material on the law of evidence in Mississippi, it would be impossible to compress it into a booklet, much less into sixty-two comprehensive rules. The burden of research on lawyers and judges should also be reduced by providing the proposed Rules as a beginning point for research. Burgeoning caseloads have strained the time of trial judges and lawyers. On many occassions there is no time to "find the law" because the pace of modern trial practice often does not allow for the time spent to find support for a single uncomplicated rule of evidence. Uniform rules of evidence rather than rules derived from case law should substantially alleviate this problem.

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[39] Spangenberg, *supra* note 25, at 1071.

[40] *See* Comment, *The Federal Rules of Evidence and Florida Evidence Law Compared*, 3 FLA. ST. U.L. REV. 384, 407 (1975).

[41] *See id.*

[42] FED. R. EVID. 403. Proposed Mississippi rule 403 is identical to Federal Rule 403.

[43] *See id.* 401-403 (relevant evidence admissible except in instances indicated).

There are advantages to adopting rules of evidence whether one agrees that any one particular substantive rule is meritorious. Aside from affording greater predictability, uniformity provides an opportunity for thorough analysis of already codified rules rather than promulgation of rules on a case-by-case basis. Predictable and uniform application by judges throughout the state will be advantageous to the bar and to litigants. In addition, adoption of the proposed Rules would prevent forum shopping to ensure presentation of certain evidence in federal court; the practitioner who is not aware of the advantages of being in federal court in a complicated products liability or malpractice suit simply has not reviewed the Federal Rules of Evidence.

It must always be remembered that there are values in our system of jurisprudence that go beyond the mere resolution of a dispute between two litigants. The value of assuring the orderly resolution of disputes must never be diminished. The public's perception that disputes are not being resolved in an orderly fashion is another reason why rules of evidence should be uniform rather than developed from minute examination of the facts in a particular case. The reliance by attorneys and judges on advisory committee notes and legislative histories compiled concurrently with development of the Federal Rules[44] will also ensure an orderly process.

As Henry Hart and John McNaulton said:

> In judging the law's handling of its tasks of fact-finding in the setting, it is necessary always to bear in mind that this is a last ditch process in which something more is at stake than truth only of a specific matter and content. There is at stake also that confidence of the public generally in the impartiality and the fairness of settlement of disputes which is essential if a ditch is to be held and a settlement accepted peacefully.[45]

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[44] In addition to the advisory Committee notes to the proposed Rules, Congressional committee reports and hearings and an extensive list of annotations and commentaries were developed on each federal rule. House and Senate reports that would be of interest include S. REP. No. 1277, 93d Cong., 2d Sess. 1-30, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7051-74; H.R. REP. No. 1597, 93d Cong., 2d Sess. 1-14, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7098, 7098-107.

[45] H. HART & J. MCNAULTON, SOME ASPECTS OF EVIDENCE, INFERENCE AND LAW 53 (1958).

The proposed Rules would promote other values such as taking subsequent remedial measures to correct flaws alleged to have caused an injury,[46] encouraging compromise of disputed claims,[47] and establishing confidential relationships.[48] The proposed Rules and the Federal Rules also recognize and encourage certain modern business practices through the business records rules[49] such as use of photocopies, computer printouts and recordings,[50] trade inscriptions,[51] commercial paper,[52] and certified copies of public records.[53]

In analyzing the Federal Rules of Evidence several important concepts should be recognized. The primary function of evidentiary rules is to ensure the trustworthiness of evidence admitted at trial. To this end, the proposed Rules should provide appropriate guidelines. On the other hand, when evidence is relevant and not unduly prejudicial, decisions on its weight and trustworthiness should be left to the trier of fact. It may also be said that the principal reason for rules of evidence is to help the court determine whether the proffered evidence is relevant. The very simple guidelines on trustworthiness contained in the Federal Rules are merely supplemental to the decision on relevance.[54] The Federal Rules have simplified these basic premises to the point that the limits of relevace are adequately defined. Thus, even though a decision on whether prejudice outweighs relevancy will always be a matter of judicial discretion,[55] the

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[46] *See* FED. R. EVID. 407 advisory committee note.

[47] *See id.* 408 advisory committee note.

[48] *See id.* 501 advisory committee note.

[49] *See id.* 803(6)-(7) advisory committee note (motivates accuracy in record-keeping).

[50] *See id.* 1001(1) advisory committee note (present-day techniques require the extension of best evidence rule to include computers, photographic systems, and other developments).

[51] *See id.* 902(7) advisory committee note (practices ensure genuineness of trade inscriptions).

[52] *See id.* 902(9) advisory committee note (Uniform Commercial Code provides useful authentication procedures).

[53] *See id.* 902(4) advisory committee note (common and statutory law ensure authenticity).

[54] *See generally* Aronson *The Federal Rules of Evidence: A Model for Improved Evidentiary Decisionmaking in Washington*, 54 WASH. L. REV. 31, 53-57 (1979) (rules ensure trustworthiness of evidence admitted).

[55] *See* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 185 (E. Cleary ed. 1972)

court has fairly well-defined guidelines upon which to make its decision.

Attorneys unfamiliar with the Federal Rules of Evidence will have few problems with the proposed Rules if they assess the probative value of particular evidence and evaluate the policy behind the liberal admission of reliable evidence. The factors to keep in mind are (1) whether the information is relevant to the issue, (2) whether it is trustworthy, and (3) whether, even though the evidence may be relevant, it is unfairly prejudicial to the opposing party. In practicing under the proposed Rules, the policies behind a particular rule should become more important to the lawyer than his "memory of cases dealing with particular points."[56]

One criticism that may come from the more traditional segments of the Bar is that the trustworthiness factor has been liberalized by the Federal Rules of Evidence. But there is certainly no reason why a copy made by some duplicating process, for example, should not be considered as trustworthy as an original, particularly since copies are relied upon daily in the business community. Although the rule of best evidence would be applicable under current practice in this situation, there is no genuine question about the trustworthiness of a copy produced by modern duplicating methods.

Although the Federal Rules of Evidence may have as many, if not more, exceptions to the hearsay rule than Mississippi,[57] this is a logical result of the basic philosophy that relies upon the jury to ferret out what information is trustworthy as opposed to a philosophy that would exclude all evidence on which trustworthiness may be an issue.[58]

The proposed Mississippi Rules of Evidence are the product of over thirteen years of study by judges, lawyers, scholars, and

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(balancing of these intangibles necessarily involves judicial discretion).

[56] Tait, *supra* note 35, at 2.

[57] *Cf.* Wright, *The Hearsay Rule and Its Exceptions: Do the Federal Rules of Evidence (801-806) Provide All the Answers*, Thirty-Fifth Annual Mississippi Law Institute on Evidence, 39, 40 (1980) (increasing exceptions to hearsay rule have expanded admissibility).

[58] For a thorough analysis of balancing trustworthiness and relevancy, see Aronson, *supra* note 54, at 53-57.

legislators in studying the Federal Rules, and of countless hours of input by Mississippi practitioners from all facets of the law practice to tailor the Federal Rules, when necessary, to Mississippi substantive law. Obviously, adoption of the proposed Rules will not mean "that the law of evidence has reached a final stage of evolution,"[59] but they will overrule much of the case law that has hampered innovative approaches to the law of evidence.

III. Practice Under the Proposed Mississippi Rules of Evidence

There are several areas in which the Federal Rules and the proposed Mississippi Rules must differ. For example, Federal Rule 302, which deals with presumptions, provides that in diversity cases state law supplies the rule for an element of a claim or defense.[60] There is no corresponding Mississippi rule.

Rule 601 of the Federal Rules provides that in civil proceedings in which state law supplies the rule of decision, the competency of the witness will be determined by state law.[61] The proposed Mississippi rule makes all witnesses competent except those defined by statute to be incompetent.[62]

A substantial distinction between the Federal Rules and the proposed Rules for Mississippi also exists in the area of privilege. Although the original draft of the Federal Rules included specific rules of privilege,[63] under the final product, privileges in civil actions in which state law supplied the rule of decision are governed by state law.[64] The subject of privileges was one of the more controversial areas encountered in promulgating the Fed-

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[59] *See* Weinstein, *supra* note 38, at v.

[60] Fed. R. Evid. 302. The Advisory Committee Note states, "It does not follow . . . that all presumptions in diversity cases are governed by state law . . . . Application of the state law is called for only when the presumption operates upon [a substantive element of the claim of the defense]." *Id.* 302 advisory committee note.

[61] *Id.* 601.

[62] For the text of the proposed Mississippi rule governing competency, *see infra* appendix at 85.

[63] *See* Dunham, *Testimonial Privileges in State and Federal Courts: A Suggested Approach*, 9 Willamette L.J. 26, 29-30 (1973) (Federal Rules drafted with view that Erie Railroad v. Tompkins, 304 U.S. 64 (1938), did not dictate application of state-created privileges in federal court).

[64] Fed. R. Evid. 501.

eral Rules. The original draft of the Federal Rules actually undertook to define privilege,[65] but the Advisory Committee, applying the principle of *Erie Railroad v. Tompkins*,[66] reasoned that federal courts necessarily would, in diversity cases, rely on the privilege rules of the state in which the litigation was pending.[67] The proposed Mississippi Rules incorporate the privilege statutes previously enacted by the legislature and those presently existing as a result of prior court decisions.[68]

Privilege is a substantive right that should be enlarged only by legislative act. Privileged communications are the result of state policies based upon concerns other than the mere admission or exclusion of evidence in private litigation. A privilege is often dispositive of the substantive rights of the litigants and cannot, therefore, properly be classified merely as procedural. The proposed Mississippi Rules on privilege also deserve close scrutiny before they are adopted. The proposed Rules that have been presented to the Mississippi Supreme Court are intended to reflect the current state of the law of privilege in Mississippi. Any attempt to limit or expand the privilege aspects of the proposed Rules would necessarily create controversy that could affect adoption of the remaining rules.

The proposed Rules also differ substantially from present Mississippi practice in some respects. Two changes in the area of expert testimony are particularly significant. Proposed rule 703 would permit an opinion on materials that are neither admitted nor admissible if the data is of a type "reasonably relied upon by experts in a particular field in forming opinions."[69] For example, under proposed rule 703 a doctor could express an opinion based upon hospital records, out-of-court statements of patients or relatives, reports of nurses, or x-rays, even though he did not interpret the x-rays himself. Perhaps even more controversial is the combined operative effect of proposed rule 703 with proposed rule 803(18), which permits the introduction of learned treatises

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[65] *Id.* art. v (Prelim. Draft 1969).

[66] 304 U.S. 64 (1938).

[67] FED. R. EVID. 501 advisory committee note.

[68] For the text of the proposed Mississippi rules governing privileges, *see infra* appendix at 81-85.

[69] *See infra* appendix at 91.

if they are established as reliable authority by the testimony of witnesses.[70] The savings in litigation costs may be significant if the use of rules 703 and 803(18) is further developed.

Although not substantially different from the Federal Rules, the hearsay provisions of the proposed Mississippi Rules represent a substantial change from present Mississippi evidentiary practice. Since an excellent analysis of the Federal hearsay rules already exists,[71] there is no need to undertake such an analysis here. One point that should be addressed, however, is the effect the proposed hearsay rules will have on the constitutional rights of a criminal defendant. Under the due process provisions of the United States Constitution, a criminal defendant has a right to confront adverse witnesses and to be present during the presentation of evidence. The Federal Rules subject witnesses to the penalty of perjury, exclude certain types of hearsay as a procedural safeguard against admitting unfairly prejudicial statements, and give the jury the right to observe the demeanor of witnesses.[72] After analysis, even the most ardent advocate of a criminal defendant should be convinced that the proposed Rules dealing with hearsay contain no constitutional deficiencies.[73]

The proposed Rules obviously represent a substantial departure from present Mississippi practice in several areas. As a whole, however, the proposed Rules offer very few changes from the Federal Rules. As a result, the adoption of the proposed Rules will bring Mississippi very close to accomplishing Judge Coleman's expressed desire that a Mississippi lawyer need no longer arm himself with two maps when walking through the "mine field" of present evidentiary practice.[74]

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[70] This practice is not now permitted in Mississippi. *See* Milner Enters. v. Jacobs, 207 So. 2d 85, 88 (Miss. 1968).

[71] *See* Barton & Cowart, *The Enigma of Hearsay*, 49 MISS. L.J. 31 (1978).

[72] California v. Green, 399 U.S. 149, 158 (1970).

[73] *See* Quinn, *Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview*, 50 U. COLO. L. REV. 277, 338-39 (1979) (rules of evidence are intended to protect constitutional rights of criminal defendants).

[74] *See supra* text accompanying notes 1, 3.

IV. The Adoption of the Proposed Mississippi Rules of Evidence—Supreme Court or Legislature?

Disagreement over what degree of rule-making authority is vested with a court, a opposed to the legislature, has been debated in the states that adopted a variation of the Federal Rules of Evidence.[75]

Three basic approaches have been taken among the states that have adopted various forms of the Federal Rules of Evidence. In some states, the legislature has enacted the rules of evidence,[76] but in others, enactment was accomplished solely through the rule-making power of the state supreme court.[77] Most jurisdictions utilize the same rule-making dichotomy recognized in Mississippi, that is, the state supreme court has the right to make any rule that is procedural and therefore within the inherent rule-making authority of the court,[78] but action on a rule involving substantive rights is solely within the prerogative of the legislature.[79] Thus, because a code of evidence necessarily involves both procedural and substantive issues there must be cooperation between the legislative and judicial branches of government.[80]

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[75] *See* J. Weinstein, *supra* note 30, at 77-82 (describing conflict between New Jersey Legislature and New Jersey Supreme Court over method of adopting rules of evidence).

[76] *See* Cobey-Song Evidence, ch. 299, 1965 Calif. Stat. 1297 (codified as amended at Calif. Evid. Code (West 1970 & Supp. 1982)); Act of June 1, 1971, ch. 402, 1971 Nev. Stat. 775 (codified as amended at Nev. Rev. Stat. § 47.020 (1980 & Supp. 1982)).

[77] *See* N.M. Sup. Ct. Order of Apr. 26, 1973 (per curiam) (order adopting rules of evidence); *cf.* Colo. Rev. Stat. § 13-25-128 (Supp. 1982) (supreme court empowered to prescribe general rules of evidence for Colorado courts); Utah Code Ann. § 78-2-4 (1953) (supreme court has power to formulate rules of evidence).

[78] *See* Newell v. State, 308 So. 2d 71, 76 (Miss. 1975) *noted in* 46 Miss. L.J. 849 (1975).

[79] *See* Levin & Amsterdam, *Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. Pa. L. Rev. 1, 14 (1958) ("in the exercise of the rule-making power [courts] have no competence to promulgate rules governing substantive law"); Green, *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?*, 26 A.B.A. J. 482, 482 (1940) (evidence rules should be considered procedural).

[80] *See, e.g.*, Fla. Stat. Ann. vol. 6B, at iii (West 1979) (Florida Evidence Code resulted from coordinated effort of judiciary and legislature). *See generally* J. Weinstein, *supra* note 78, at 77-88 (courts and legislature should cooperate in formulating rules of practice and procedure).

Because authority for the promulgation of the Federal Rules of Evidence was derived from the Rule-Making Act of 1934,[81] this method of adoption provides little insight into the delineation of power between the judicial and legislative bodies. The language of the 1934 Act, which was first used in adopting the Federal Rules of Civil Procedure in 1938,[82] states in pertinent part:

> The Supreme Court of the United States shall have the power to provide, by general rules for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings and motions and the practice and procedure in civil actions of law. Said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant.[83]

Even without enabling statutes, the common law appears to give the judicial branch the same rights to make rules that are proper for the administration of its courts, including evidentiary rules, as were granted by statute in the federal system.[84] The problem lies in determining what is meant by the term "substantive rights." Most litigation concerned with the definition of substantive rights has been in the area of conflict of laws. Without question, the prevailing view in that area is that the law of evidence, as a whole, is procedural rather than substantive.[85] It follows that if a court, such as the Mississippi Supreme Court, has the authority to prescribe rules of procedure, it also possesses the power to prescribe rules of evidence.[86]

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[81] Rule-making Act of 1934, ch. 651, § 1, 48 Stat. 1064; *see* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, A PRELIMINARY REPORT ON THE ADVISABILITY AND FEASIBILITY OF DEVELOPING UNIFORM RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS 29, 32 n.125, 35 n.138 (1962).

[82] *See* 1B J. MOORE & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.501[2] (2d ed. 1982).

[83] Rule-making Act of 1934, ch. 651, § 1, 48 Stat. 1064 (current version at 28 U.S.C. § 2072 (1976)).

[84] *See* Newell v. State, 308 So. 2d 71, 76 (Miss. 1975) (power to promulgate procedural rules emanates from constitutional concept of separation of powers). *See generally*, 158 A.L.R. 705 (1945) (rule-making power is inherently vested with judiciary); 110 A.L.R. 22 (1937) (same).

[85] *See* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 433 (1971).

[86] *See, e.g., Proposed Rules of Evidence, 1973: Hearings Before the Special Sub-*

Unfortunately, the trial bar and trial judges are aware that questions of evidence very often are outcome-determinative. Therefore, some have authoritatively argued that the rule-making power of the court does not encompass the promulgation of rules of evidence.[87]

It is the author's opinion that the best system is one patterned after the federal system in which the Supreme Court promulgates rules based on the work and recommendations of an advisory committee. As with rules of procedure, any effective system must necessarily incorporate a three-tiered approach. As the Chief Justice of the Mississippi Supreme Court has proposed, the first step must be the creation of an Advisory Committee on Rules of Procedure and Evidence.[88] This Advisory Committee should consist of circuit and chancery judges and attorneys appointed by the supreme court and should be chaired by a member of the supreme court appointed by the Chief Justice.[89] There should be a concerted effort to include a geographi-

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committee on Reform of Federal Criminal Laws of the House Committee on the Judiciary, 93d Cong., 1st Sess. 73, 77 (1973) (statement of Judge Albert B. Maris, Third Circuit Court of Appeals).

[87] See *id.* 155, at which Justice Goldberg stated:

> My misgivings about the proposed Rules of Evidence concern the second assumption, namely that the Rules extend only to matters of practice and procedure. To my mind, some of the proposed rules extend beyond mere matters of procedure and represent real changes in the substantive rights and duties of persons throughout the country.

[88] *See supra* note 18.

[89] Chief Justice Patterson suggested, in a July 1982 meeting with the Judicial Liaison Committee, that the advisory committee should be composed of three county judges from each supreme court district, three circuit judges, three chancellors, three lawyers and representatives of both law schools. The author respectfully takes issue with what he deems to be underrepresentation of the Bar on the committee. Although judges must administer the rules of evidence and the rules of procedure, it must be remembered that 95% of all tort litigation is settled. *See supra* text accompanying note 38. Thus, 95% of the experience of litigating under the rules of procedure and evidence are never presented in a trial setting. The committee should not, of course, be composed of 95% trial attorneys, but the author strongly believes that a minimum of one-half of the members of any committee that promulgates rules of evidence or procedure should be from the trial bar. It is respectfully suggested, because subcommittees on the various rules of procedure and evidence will be necessary to accomplish meaningful goals, that the committee be composed of three attorneys from each supreme court district, one county judge, one circuit judge, and one chancery judge from each district, and one representative designated by the dean of any accredited law school in the state. This combination would result in a committee fairly representative of the bench, the bar, and the academic

cal and philosophical cross-section of the Bar. The Advisory Committee would submit proposed changes to the supreme court, and if substantive rights are affected, the legislature would maintain its prerogative to enact these changes.

Just as adoption of the Mississippi Rules of Civil Procedure was not an end to rule-making in Mississippi, the proposed Rules of Evidence are also only a starting point. The proposed Rules should be adopted as presented to the supreme court. Nevertheless, an established procedure should be instituted by which amendments necessary to accommodate particular public policies may be adopted.[90] If the amendment is substantive, the legislature should act, but, if the amendment is procedural, the supreme court, pursuant to its inherent rule-making power, may adopt the amendment after it has been proposed by the Advisory Committee.

CONCLUSION

The ready availability and simplicity of the proposed Rules of Evidence are obvious to anyone who has been involved in litigation to any degree. The advantages of having a uniform and readily available body of literature on intricate points of evidence from jurisdictions in twenty-two states as well as the federal courts, are equally apparent.

It is true that in considering the proposed Rules from the perspective of one particular litigant, there are areas subject to criticism. But many of those who most harshly criticized the adoption of the Mississippi Rules of Civil Procedure are now finding that in the hands of a skilled practitioner, they can be used to an advantage. The same can be expected of the proposed Rules of Evidence.

The thrust of the proposed Rules is to allow all relevant, trustworthy, and nonprejudicial evidence to be admitted for con-

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community.

[90] Arlen Coyle has suggested that there should be a continuing committee to advise the court on rules. Interview with Arlen Coyle, in Oxford, Mississippi (Jan. 24, 1983). There seems to be agreement that such a committee should be permanent. Funding is the only ingredient missing. There is no funding at present for administrative costsand for printing proposed rules disseminated to the bench and bar.

sideration by the fact-finder. Guidance on what is trustworthy and what is relevant will be easily available to every practitioner and trial judge.

The greatest advantage will be realized by the lawyer who seeks to determine, in evaluating his case, the policy reasons behind the proposed Rules rather than having to memorize unconnected and often inconsistent previous rulings and legislative enactments. Adoption of the proposed Rules will lead to less expensive advocacy and fairer adjudication for the litigants. It will also decrease forum shopping. There is no question that a studious and progressive Advisory Committee will recommend changes to the court in the coming years. For the present, however, adoption of the proposed Rules will substantially benefit the bench and bar.

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ARTICLE I. GENERAL PROVISIONS

Rule 101

SCOPE

These rules govern proceedings in the courts of the State of Mississippi to the extent and with the exceptions stated in rule 1101.

Rule 102

PURPOSE AND CONSTRUCTION

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Rule 103

RULINGS ON EVIDENCE

(a) **Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

> (1) **Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
> (2) **Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) **Record of offer and ruling.** The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) **Hearing of jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissi-

ble evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Rule 104

PRELIMINARY QUESTIONS

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 105

LIMITED ADMISSIBILITY

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury

accordingly.

Rule 106

REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

ARTICLE II. JUDICIAL NOTICE

Rule 201

JUDICIAL NOTICE OF ADJUDICATIVE FACTS

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. In a civil action or proceeding the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to accept as conclusive any fact judicially noticed.

ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

Rule 301

PRESUMPTIONS IN GENERAL IN CIVIL ACTIONS AND PROCEEDINGS

In all civil actions and proceedings not otherwise provided for by act of the Legislature or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 401

DEFINITION OF "RELEVANT EVIDENCE"

"Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402

RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Mississippi, by Mississippi Statute, or by this code. Evidence which is not relevant is not admissible.

Rule 403

EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by

considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404

CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

> **(1) Character of accused.** Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
> **(2) Character of victim.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution to rebut evidence that the victim was the first aggressor;
> **(3) Character of witness.** Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 405

METHODS OF PROVING CHARACTER

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

Rule 406

HABIT; ROUTINE PRACTICE

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Rule 407

SUBSEQUENT REMEDIAL MEASURES

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Rule 408

COMPROMISE AND OFFERS TO COMPROMISE

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay,

or proving an effort to obstruct a criminal investigation or prosecution.

Rule 409

PAYMENT OF MEDICAL AND SIMILAR EXPENSES

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Rule 410

INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS, AND RELATED STATEMENTS

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) A plea of guilty which was later withdrawn;

(2) A plea of nolo contendere;

(3) Any statement made in the course of any proceedings under Mississippi statutory or rule of court provisions regarding either of the foregoing pleas; or

(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which does not result in a plea of guilty or which results in a plea of guilty later withdrawn.

However, such a statement is admissible (1) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (2) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

Rule 411

LIABILITY INSURANCE

Evidence that a person was or was not insured against lia-

bility is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Rule 412

RAPE CASES; RELEVANCE OF VICTIM'S PAST BEHAVIOR

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or assault is not admissible.

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is:

(1) Admitted in accordance with subdivisions (c) (1) and (c) (2) hereof and is constitutionally required to be admitted; or

(2) Admitted in accordance with subdivision (c) hereof and is evidence of

(A) Past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) Past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which rape or assault is alleged.

(c)(1) If the person accused of committing rape or assault with intent to commit rape intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is sched-

uled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.

(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses including the alleged victim, and offer relevant evidence. Notwithstanding subdivision (b) of rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which rape or assault with intent to commit rape is alleged.

ARTICLE V. PRIVILEGES

Rule 501

PRIVILEGES RECOGNIZED ONLY AS PROVIDED

Except as otherwise provided by the United States Constitution, the State Constitution, Statute, by these rules, or by other rules applicable in the courts of this state to which these

rules apply, no person has a privilege to:

(1) Refuse to be a witness;

(2) Refuse to disclose any matter;

(3) Refuse to produce any object or writing; or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

Rule 502

LAWYER-CLIENT PRIVILEGE

(a) Definitions. As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2) A "representative of the client" is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.

(3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) A "representative of the lawyer" is one employed by the lawyer to assist the lawyer in the rendition of professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself or his representative and his lawyer or his lawyer's representative, (2) between his lawyer and the lawyer's representative, (3) by him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (4) between

representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

(c) Who may claim the privilege. The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) Exceptions. There is no privilege under this rule:

(1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer;

(4) Document attested by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(5) Joint clients. As to a communication relevant to a matter of common interest between or among two (2) or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients; or

(6) Public officer or agency. As to a communication between a public officer or agency and its lawyers unless the communication concerns a pending investigation, claim or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation, or proceeding in the public interest.

Rule 503

PHYSICIAN AND PSYCHOTHERAPIST-PATIENT PRIVILEGE

(a) Definitions. As used in this rule:

(1) A "patient" is a person who consults or is examined or interviewed by a physician or psychotherapist.

(2) A "physician" is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be.

(3) A "psychotherapist" is (1) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, or (2) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(4) A communication is "confidential" if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination, or interview, persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(b) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional condition, including alcohol or drug addiction, among himself, his physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(c) Who may claim the privilege. The privilege may be claimed by the patient, his guardian or conservator, or the personal representative of a deceased patient. The person who was the physician or psychotherapist at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.

(d) Exceptions.

(1) Proceedings for hospitalization. There is no privilege under this rule for communications relevant to an issue in proceeding to hospitalize the patient for mental illness, if the physician or psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) Examination by order of court. If the court orders an examination of the physical, mental or emotional condition of a patient, whether a party or a witness, communications made in the course thereof are not privileged under this rule with respect to the particular purpose of which the examination is ordered unless the court orders otherwise.

Rule 504

HUSBAND-WIFE PRIVILEGE

(a) Definition. A communication is confidential if it is made privately by any person to his or her spouse and is not intended for disclosure to any other person.

(b) General rule of privilege. In any proceeding, civil or criminal, a person has a privilege to prevent his spouse from testifying as to any confidential communication between himself and his spouse.

(c) Who may claim the privilege. The privilege may be claimed by either spouse in their own right or on behalf of the other.

(d) Exceptions. There is no privilege under this rule in a proceeding in which one spouse is charged with a crime against the person or property of (1) the other, (2) a child of either, (3) a person residing in the household of either, or (4) a third person committed in the course of committing a crime against any of them.

Rule 505

PRIEST-PENITENT PRIVILEGE

(a) Definitions. As used in this rule:

(1) A "clergyman" is a minister, priest, rabbi or other similar functionary of a church, religious organization, or reli-

gious denomination.

(2) A communication is "confidential" if made privately and not intended for further disclosure except in furtherance of the purpose of the communication.

(b) General rule of privilege. A person has a privilege to refuse to disclose and prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.

(c) Who may claim the privilege. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman shall claim the privilege on behalf of the person unless the privilege is waived.

(d) Other. A clergyman's secretary, stenographer, or clerk shall not be examined without the consent of the clergyman concerning any fact, the knowledge of which was acquired in such capacity.

ARTICLE VI. WITNESSES

Rule 601

GENERAL RULE OF COMPETENCY

Every person is competent to be a witness except as restricted by Mississippi Code Sections 13-1-5 (competency of spouses); 13-1-7 (dead man statute); and 13-1-11 (persons convicted of perjury or subornation of perjury), or by law.

Rule 602

LACK OF PERSONAL KNOWLEDGE

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

Rule 603

OATH OR AFFIRMATION

Before testifying, every witness shall be required to declare

that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

Rule 604

INTERPRETERS

An interpreter is subject to the provisions of these rules relating to qualification as an expert to the administration of any oath or affirmation that he will make a true translation.

Rule 605

COMPETENCY OF JUDGE AS WITNESS

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Rule 606

COMPETENCY OF JUROR AS WITNESS

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Rule 607

WHO MAY IMPEACH

The credibility of a witness may be attacked by any party, including the party calling him.

Rule 608

EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Rule 609

IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1)

was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonest or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Rule 610

RELIGIOUS BELIEFS OR OPINIONS

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced.

Rule 611

MODE AND ORDER OF INTERROGATION AND PRESENTATION

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination shall not be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Rule 612

WRITING USED TO REFRESH MEMORY

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh his memory for the purpose of testifying, either (1) while testifying, or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce into evidence those portions which relate to the testimony of the witness. If it is claimed that the writing con-

tains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

Rule 613

PRIOR STATEMENTS OF WITNESSES

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

Rule 614

CALLING AND INTERROGATION OF WITNESSES BY COURT

(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.

(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at

the next available opportunity when the jury is not present.

Rule 615

EXCLUSION OF WITNESSES

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 701

OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to the clear understanding of his testimony or the determination of a fact in issue.

Rule 702

TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 703

BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming

opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 704

OPINION ON ULTIMATE ISSUE

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Rule 705

DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

The expert may testify in terms of opinion or inferences and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 706

COURT APPOINTED EXPERTS

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have the opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds

which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

ARTICLE VIII. HEARSAY

Rule 801

DEFINITIONS

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) his own statement, in either

his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Rule 802

HEARSAY RULE

Hearsay is not admissible except as provided by law.

Rule 803

HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. A memorandum or record

concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provision of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the source of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other cir-

cumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document pur-

porting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more, the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community, State or nation in which located.

(21) Reputation as to character. Reputation of a person's character among his associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not

including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 804

HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declaration:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) Testifies to a lack of memory of the subject matter of his statement; or

(4) Is unable to be present or to testify at the hearing

because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption,

marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 805

HEARSAY WITHIN HEARSAY

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Rule 806

ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT

When a hearsay statement, or a statement defined in rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible

for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule 901

REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conver-

sations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence twenty years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

Rule 902

SELF-AUTHENTICATION

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or of the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. A document purporting to bear the signature in his official ca-

pacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign capacity to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the

course of business and indicating ownership, control or origin.

(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions under Acts of Congress. Any signature, document, or other matter declared by Act of the United States Congress or the Mississippi Legislature to be presumptively or prima facie genuine or authentic.

Rule 903

SUBSCRIBING WITNESS' TESTIMONY UNNECESSARY

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001

DEFINITIONS

For purposes of this article the following definitions are applicable:

(1) Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. "Photographs" include still photographs, x-ray films, video tapes, and motion pictures.

(3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device,

any printout or other output readable by sign, shown to reflect the data accurately, is an "original."

(4) Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

Rule 1002

REQUIREMENT OF ORIGINAL

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided by law.

Rule 1003

ADMISSIBILITY OF DUPLICATES

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Rule 1004

ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or

photograph is not closely related to a controlling issue.

Rule 1005

PUBLIC RECORDS

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Rule 1006

SUMMARIES

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

Rule 1007

TESTIMONY OR WRITTEN ADMISSION OF PARTY

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the nonproduction of the original.

Rule 1008

FUNCTIONS OF COURT AND JURY

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph

produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

ARTICLE XI. MISCELLANEOUS RULES

Rule 1101

APPLICABILITY OF RULES

(a) Courts and proceedings. Except as otherwise provided by subdivision (b), these rules apply to all actions and proceedings in the courts of the State of Mississippi.

(b) Rules inapplicable. Except for the rules pertaining to privileges, these rules do not apply in the following situations:

(1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104(a).

(2) Grand jury. Proceedings before grand juries.

(3) Miscellaneous proceedings. Proceedings for extradition or rendition; probable cause hearings in criminal cases and youth court cases; sentencing; disposition hearings; granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(4) Contempt proceedings. Contempt proceedings in which the court may act summarily.

Rule 1102

TITLE

These rules shall be known and may be cited as the Mississippi Rules of Evidence.

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1982 MISSISSIPPI SUPREME COURT REVIEW

ADMINISTRATIVE LAW

I. Workmen's Compensation

A. "Special Hazards" Exception to Going and Coming Rule

One of the most significant developments in the area of workmen's compensation[1] was the Mississippi Supreme Court's adoption of the

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[1] Other cases decided in the area of workmen's compensation during 1982 by the Mississippi Supreme Court include Leathers v. Tupelo Coffee Co., 423 So. 2d 122, 123 (Miss. 1982) (case remanded to Workmen's Compensation Commission to avoid fragmentary appeals arising from undetermined issues); Johnston v. Hattiesburg Clinic, 423 So. 2d 114, 115, 120 (Miss. 1982) (motion requesting review of evidence by Workmen's Compensation Commission tolls thirty-day appeal period; defendants failed to rebut presumption of causal connection between decedant's death and her employment); City of Kosciusko v. Graham, 419 So. 2d 1005, 1008-09 (Miss. 1982) (payment of medical expenses by compensation carrier tolls one-year statute of limitation; when employer pays wages with full knowledge of claimant's receipt of workmen's compensation benefits and of extent of claimant's injuries, payments to injured employee are not intended to be in lieu of compensation and, thus, are not to be credited against workmen's compensation benefits); Day-Brite Lighting Div. v. Cummings, 419 So. 2d 211, 213 (Miss. 1982) (when employer files petition for review with Workmen's Compensation Commission but subsequently agrees to let administrative judge make additional findings of fact, failure to file a subsequent petition for review does not necessarily divest jurisdiction of Commission to review administrative judge's first order); Agee v. Bay Springs Forest Prod., Inc., 419 So. 2d 188, 189 (Miss. 1982) (when injured employee returns to work and receives the same or greater earnings as received prior to injury, a rebuttable presumption is created that employee has suffered no loss in wage-earning capacity); Hedgpeth v. Hair, 418 So. 2d 814, 815 (Miss. 1982) (when employer purchases life insurance on employee's life in lieu of insurance in compliance with Mississippi Workmen's Compensation Act, proceeds of the life insurance policy will not serve as advance payment of compensation and employer will be allowed no credit for the proceeds); Estate of Babb v. GTE Sylvania, Inc., 417 So. 2d 545, 550 (Miss. 1982) (findings of Workmen's Compensation Commission upheld when supported by substantial evidence); Barr v. Conoco Chem., Inc., 412 So. 2d 1193, 1196 (Miss. 1982) (injured employee is allowed medical benefits as long as required, but to avoid bar of one-year statute of limitations employee must request and enforce payment of benefits during each twelve month period); Kelly Bros. Contractors, Inc. v. Windham, 410 So. 2d 1322, 1324 (Miss. 1982) (compensation will be awarded when death was caused by overdose of medication combined with alcohol consumption if overdose resulted from mental disturbance caused by compensable injury).

Several other 1982 Mississippi Supreme Court decisions also dealt with matters of administrative law. These include: (1) *School Boards*: Sims v. Board of Trustees, 414 So. 2d 431, 434-35 (Miss. 1982) (board of trustees has burden of proving its charges of insubordination and lack of cooperation of teacher it dismissed; defined insubordination as a

"constant or continuing intentional refusal to obey direct or implied order, reasonable in nature, and given by and with proper authority"). (2) *Employment Security*: Mississippi Employment Sec. Comm'n v. City of Columbus Light & Water Dept., 424 So. 2d 553, 557 (Miss. 1982) (state political subdivisions are required by MISS. CODE ANN. § 71-5-357 (Supp. 1982) to reimburse state for unemployment benefits paid to former employees); Mississippi Employment Sec. Comm'n v. McLeod, 419 So. 2d 207, 210-11 (Miss. 1982) (when employee was laid off and subsequently returned to school to pursue studies in field that would increase his value to employer, and would return to work at any time within the meaning of MISS. CODE ANN. § 71-5-511(c) (Supp. 1981), he was entitled to unemployment benefits); Wheeler v. Arriola, 408 So. 2d 1381, 1383 (Miss. 1982) (misconduct is sufficient to disqualify a person from unemployment insurance benefits if conduct evinces willful and wanton disregard for employer's interest or negligence in such degree to manifest culpability or wrongful intent); Tate v. Mississippi Employment Sec. Comm'n, 407 So. 2d 109, 111 (Miss. 1982) (voluntary termination of employment when work hours are cut to point that necessary working expenses are in excess of wages is sufficient to constitute "good cause" within the meaning of Mississippi Employment Securities Act). (3) *State Bar*: An Attorney v. Mississippi State Bar Ass'n, 420 So. 2d 1367, 1369 (Miss. 1982) (attorney may not be subject to disciplinary measures for actions taken as an administrator of his former wife's estate when no attorney-client relationship existed between himself and his children who filed the complaint). (4) *Zoning*: Board of Aldermen v. Jenkins, 423 So. 2d 1323, 1328 (Miss. 1982) (denial by mayor and board of aldermen of petition to rezone reinstated); Bell v. City of Canton, 412 So. 2d 1179, 1180 (Miss. 1982) (proponents of changes in municipal zoning ordinances have burden of proving that decision to deny rezoning was arbitrary, capricious, and discriminatory by introducing clear and convincing evidence that mistake was made in original zoning plan or that area surrounding subject property had changed in such manner that public need required property to be rezoned). (5) *Commission on Judicial Performance*: *In re* Lambert, 421 So. 2d 1023, 1025 (Miss. 1982) (multiple sanctions may be imposed when acts of justice or judge complained of constitute more than one of the prohibited actions of MISS. CONST. art. VI, § 177A); *In re* Anderson, 412 So. 2d 743, 747-48 (Miss. 1982) (justice court judge removed from office for willful misconduct when he credited fines of traffic law violators at amount lower than that actually received). (6) *Other Commissions*: Lambert v. Ogden, 423 So. 2d 1319, 1322 (Miss. 1982) (refund ordered of use taxes incorrectly assessed and collected by tax commission); South Hinds Water Co. v. Mississippi Pub. Serv. Comm'n, 422 So. 2d 275, 282-84 (Miss. 1982) (authorized but unpaid officer's salaries are legitimate operating expense; interest on customer's deposits cannot be included as operating expense if deposits were not subtracted from utility's rate base; neither interest, indebtedness nor dividends may be included as operating expenses; land, owned by utility, which is not useful or being used, may not be included to determine utility's rate base); Sanford v. Board of Supervisors, 421 So. 2d 488, 490-91 (Miss. 1982) (order appointing two supervisors to inspect and lay out road and to report their proceedings at next supervisors' meeting is not final order from which an appeal can be taken); Phillips Constr. Co. v. Mississippi State Hwy. Comm'n, 420 So. 2d 1374, 1376 (Miss. 1982) (under MISS. CODE ANN. § 65-2-15 (1972), appeal from State Highway Arbitration Board not perfected until State Highway Commission files supersedeas bond with circuit court); Strong v. Bostick, 420 So. 2d 1356, 1362 (Miss. 1982) (Mississippi Commission on Wildlife Conservation has authority to promulgate rules and regulations concerning the taking of deer when the rules do not conflict with existing statutes); Smith v. Sullivan, 419 So. 2d 184, 187-88 (Miss. 1982) (appellate court's power to review adminis-

"special hazards" exception to the going and coming rule[2] in *Stepney v. Ingalls Shipbuilding Div., Litton Systems, Inc.*[3] In *Stepney*, the claimant was seriously injured in a two-car collision that occurred on the side access road leading to the employer's shipyard[4] and subsequently filed for workmen's compensation benefits.[5] Ingalls, a self-insured employer,[6] argued that the injury did not arise out of and in the course of the employment; therefore, the claimant was not entitled to workmen's compensation benefits.[7] In asserting this position, Ingalls relied on the general rule that "hazards encountered by employees while going to or returning from their regular place of work and off the employer's premises are not incident to employment and accidents

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trative commission consists of determining whether the administrative order is supported by substantial evidence and is not purely arbitrary and capricious); Andrews v. Waste Control, Inc., 409 So. 2d 707, 712-13 (Miss. 1982) (board of supervisors may only restrict weight loads on county roads in strict compliance with MISS. CODE ANN. § 65-7-45 (1972), which requires weight restrictions to be imposed based on tire width).

[2] Ordinarily, an employee cannot recover workmen's compensation benefits unless his injury arises "out of and in the course of employment." MISS. CODE ANN. § 71-3-36 (Supp. 1982); *see also* V. DUNN, MISSISSIPPI WORKMEN'S COMPENSATION § 156 (2d ed. 1967); 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 13.00 (1978). This prerequisite to the recovery of benefits has generally been interpreted to exclude compensation for injuries incurred while going to or returning from the employer's premises. *See* Miller Transporters, Inc. v. Dependents of Seay, 350 So. 2d 689, 691 (Miss. 1977); Aetna Fin. Co. v. Bourgoin, 252 Miss. 852, 858, 174 So. 2d 495, 497 (1965); Wallace v. Copiah Cnty. Lumber Co., 223 Miss. 90, 98, 77 So. 2d 316, 317-18 (1955); V. DUNN, *supra*, § 175; 1 A. LARSON, *supra*, § 15.11. This rule has long been considered too rigid and has been the subject of numerous exceptions. *See infra* note 11 and accompanying text. One frequently invoked exception has been the "special hazards" exception or the "threshold doctrine." This rule consists of two elements: "The first is the presence of a special hazard at the particular off-premises point. The second is the close association of the access route with the premises, so far as going and coming are concerned." 1 A. LARSON, *supra*, § 15.13. When these two elements exist, the course of employment is "extended" to include injuries occuring at this hazardous location. *Id.* § 15.15.

[3] 416 So. 2d 963 (Miss. 1982).

[4] *Id.* at 963. The claimant was injured on his return to the shipyard from his lunch break. *Id.* The access road in question was a six-lane highway used primarily by Ingalls' employees.

[5] *Id.* at 963.

[6] A self-insured employer is an employer who has been authorized under the provisions of MISS. CODE ANN. § 71-3-3(g) (Supp. 1982) "to carry his own liability on his covered employees without insuring in a stock or mutual carrier." A self-insured employer must comply with the provisions of *id.* § 71-3-75 and GENERAL RULE 7, RULES OF THE MISSISSIPPI WORKMEN'S COMPENSATION COMMISSION (1982).

[7] 416 So. 2d at 963. See *supra* note 2 for discussion of the "course of employment" requirement.

arising therefrom are not compensable."[8] Ingalls' position was upheld by an administrative judge, by the full Mississippi Workmen's Compensation Commission, and by the Circuit Court of Jackson County.[9]

On appeal to the Mississippi Supreme Court, the case was reversed.[10] Reiterating that the so called "going and coming" rule was not to be rigidly applied,[11] the court invoked the "special hazards" exception to the rule.[12] Indeed, the court had forewarned employers of the eventual application of the "special hazards" exception as early as 1955 in *Wallace v. Copiah County Lumber Co.*[13] In applying the "special hazards" exception to *Stepney*, the court viewed six elements as significant. First, the access road upon which the accident occurred was the *only* source of entry or exit to the employer's facility. Second, the access road, although not owned or maintained by the employer, was used primarily by Ingalls' employees. Third, thousands of Ingalls' employees used this access road during shift changes and lunch breaks. Fourth, the employer owned the property on both sides of the access road and had erected a sign warning employees that the intersection was dangerous. Fifth, the placement of a warning sign was an admission by the employer that it was aware of the hazardous nature of the intersection. Finally, because the claimant worked regularly at Ingalls and had to traverse the dangerous intersection on a routine basis, he was exposed to a greater danger than the general public.[14]

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[8] 416 So. 2d at 964 (quoting Aetna Fin. Co. v. Bourgoin, 252 Miss. 852, 858, 174 So. 2d 495, 497 (1965)). This is commonly referred to as the "going and coming" rule. 416 So. 2d at 964; *see supra* note 2.

[9] 416 So. 2d at 963.

[10] *Id.* at 967.

[11] *Id.* at 964. In 1955, in Wallace v. Copiah Cnty. Lumber Co., 223 Miss. 90, 77 So. 2d 316 (1955), the court recognized the inherent problems associated with the strict application of the "going and coming" rule and listed the following possible exceptions to it:

> (1) [W]here the employer furnishes the means of transportation, or renumerates the employee; or (2) where the employee performs some duty in connection with his employment at home; or (3) where the employee is injured by some hazard or danger which is inherent in the conditions along the route necessarily used by the employee; or (4) where the employer furnishes a hazardous route; or (5) where the injury results from a hazardous parking lot furnished by the employer; or (6) where the place of injury, although owned by one other than the employer, is in such close proximity to the premises owned by the employer as to be, in effect, a part of such premises.

Id. at 99, 77 So. 2d at 318.

[12] 416 So. 2d at 966-67.

[13] 223 Miss. 90, 77 So. 2d 316 (1955).

[14] 416 So. 2d at 966.

The *Stepney* decision indicates the Mississippi Supreme Court's willingness to expand the scope of the employer's liability in favor of the employee. But the precise extent to which this liability will be extended because of the "special hazards" exception is uncertain. One reason for this uncertainty lies in the elements relied upon by the court in reaching its decision.[15] Although the court carefully outlined these criteria, it declined to state whether existence of all of the enumerated elements was necessary to apply the "special hazards" exception, or if not, which would be critical in future cases involving the exception. Employers can therefore only speculate regarding how far their liability may be extended.[16] In defense of the court's position, it is difficult to establish a bright line test that will apply uniformly in all situations.[17] In any event, Mississippi employers and insurance carriers must await future court decisions that will determine the extent of the "special hazards" exception and the scope of liability for employee injuries.

B. Workmen's Compensation as an Exclusive Remedy

Two 1982 Mississippi Supreme Court decisions held the Mississippi Workmen's Compensation Act (the Act) to be the exclusive remedy of an employee who, after suffering a job-related injury, sought recovery against someone other than his employer. In *Doubleday v. Boyd Construction Co.*,[18] the plaintiff, an employee of a subcontractor on a construction project, filed a common law negligence suit against Boyd Construction Company, the prime contractor of the construction project, seeking recovery for an on-the-job injury. The plaintiff's employer, the subcontractor, had acquired insurance and paid the plaintiff benefits commensurate with his injury.[19] Boyd asserted that it had required the plaintiff's employer to acquire workmen's compensation insurance for its employees and, therefore, Boyd claimed to be a "stat-

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[15] *See supra* text accompanying note 14.

[16] The court indicated that an injury may be compensable if the access road leading to the employer's facility is the *sole* means of access to the premises, 416 So. 2d at 964-65, but did not state whether this factor in and of itself was sufficient to find an injury compensable. Indeed, because this factor completely ignores the requirement that a special hazard exist at the off-premises location of the injury, it should not be sufficient standing alone. *See supra* note 2. The court simply did not indicate which factors would be essential to support future cases under the "special hazards" exception.

[17] For a thorough discussion of the problems associated with formulating hard and fast rules in this area, see 1 A. LARSON, *supra* note 2, § 15.12.

[18] 418 So. 2d 823 (Miss. 1982).

[19] *Id.* at 824.

utory employer."[20] Because it was a statutory employer, Boyd contended that it was immune from suit by the employees of its subcontractor.[21] The Circuit Court of Grenada County agreed with Boyd's interpretation of the action and dismissed the suit.[22]

The Act is based, as are most states' workmen's compensation acts, on the employment relationship.[23] Thus, it follows that an employment relationship must exist before the Act will apply. An exception to the requirement that an employment relationship must exist arises when a prime contractor is found to be a "statutory employer."[24] Since the law imposes liability for the injuries of a subcontractor's employees on the "statutory employer," most courts have held that the "statutory employer" is immune from common law negligence actions.[25] Thus, an injured employee's exclusive remedy against the prime contractor for a job-related injury is through application of the workmen's compensation statutes.[26]

In *Doubleday*, the court was confronted with determining what constitutes a "statutory employer."[27] The court sought guidance from

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[20] *Id.* A "statutory employer" is a prime contractor who is liable by statute for the payment of compensation benefits to the employees of a subcontractor. V. DUNN, *supra* note 2, § 17; 2A A. LARSON, *supra* note 2, § 72.31(a). This requirement under the Act is found at MISS. CODE ANN. § 71-3-7(d) (1972).

Because of this increased liability of the prime contractor, most courts have extended the immunity of the employer to the "statutory employer." *E.g.*, Mosley v. Jones, 224 Miss. 725, 732, 80 So. 2d 819, 821 (1955). *See generally* 2A A. LARSON, *supra* note 2, § 72.31(a) & n.47; 51 MISS. L.J. 623, 628-29 (1980).

[21] 418 So. 2d at 824.

[22] *Id.*

[23] *See* 51 MISS. L.J. at 628.

[24] *See supra* note 20.

[25] *See, e.g.*, Slusher v. Paramount Warrior, Inc., 336 F. Supp. 1381, 1384 (W.D. Va. 1971); Downing v. Dondlinger & Sons Constr. Co., 294 F. Supp. 104, 109-10 (W.D. Mo. 1968).

[26] 418 So. 2d at 824.

[27] *Id.* It is important to focus on the precise issue in *Doubleday* to distinguish it from the court's earlier decision in Mosley v. Jones, 224 Miss. 725, 80 So. 2d 819 (1955). In *Mosley*, an employee of a subcontractor filed a common law negligence suit against the prime contractor. *Id.* at 729-30, 80 So. 2d at 819-20. The prime contractor, however, had secured compensation insurance on the subcontractor's employees when the subcontractor had provided none. *Id.* at 730-31, 80 So. 2d at 820. The court held that the prime contractor was a "statutory employer" within the meaning of the Act and was immune from common law negligence suits. *Id.* at 732, 80 So. 2d at 821. In *Doubleday*, the issue was not whether a "statutory employer" was immune, but whether Boyd Construction Company was a "statutory employer" within the meaning of the Act. The plaintiff argued that Boyd was not a "statutory employer" because it did not "secure" the compensation insurance for the subcontractor; instead, Boyd had merely contractually required

the Act, which provides in pertinent part: "In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor, unless the subcontractor has secured such payment."[28] Boyd's contractual stipulation requiring the subcontractor to provide workmen's compensation insurance for its employee's was sufficient to make Boyd a "statutory employer," and thereby immunize it against common law negligence suits.[29]

With the *Doubleday* decision, Mississippi joined the growing number of states that grant immunity to the prime contractor when the subcontractor has secured compensation insurance.[30] This position is consistent with the Act's purpose of protecting the employees of a subcontractor by ensuring that all employees on a construction project are covered by workmen's compensation insurance.[31] But this decision also adds to the growing list of third persons who are entitled to immunity from negligence suits by injured employees.[32]

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the subcontractor to procure his own insurance, which he did. 418 So. 2d at 824-25. The rationale behind this position is that because the prime contractor did not actually purchase the compensation insurance at its own expense, it should not benefit from the subcontractor having paid for the insurance. This rationale completely ignores the prime contractor's indirect payment for the insurance through its payment to the subcontractor for his services. The subcontractor undoubtedly passed the cost of the compensation insurance on to the prime contractor. *See* 2A A. LARSON, *supra* note 2, § 72.31(b).

[28] MISS. CODE ANN. § 71-3-7(d) (1972).

[29] 418 So. 2d at 826-27. The court's apparent interpretation of the word "secure" as used in MISS. CODE ANN. § 71-3-7(d) (1972) allowed the prime contractor to ensure that the subcontractor obtain compensation insurance by contractual requirement as well as to permit the prime contractor to actually purchase the insurance itself. The court rationalized this interpretation of the Act by stating:

> It would be paradoxical however, in our opinion, to hold as the appellant entreats that a general contractor risk personal injury judgments in common law suits if he complies with the statute by contractually securing compensation insurance by his subcontractor, but if he lets work to subcontractors who do not comply with the act, then his liability is limited to the sums provided by the act. We do not think the legislature intended such an improbable result.

418 So. 2d at 826. This reasoning has merit because the prime contractor remains liable to the employee if the subcontractor did not procure the compensation insurance. *See* Mosley v. Jones, 224 Miss. 725, 732, 80 So. 2d 819, 821 (1955). Thus, the desired result of insuring job-related injuries has been achieved.

[30] *See, e.g.*, Wofford v. Dow Chem. Co., 335 So. 2d 536, 537-38 (La. Ct. App. 1976); Parker v. Williams and Madjanik, Inc., 267 S.E.2d 524, 527-28 (S.C. 1980); *see also* 2A A. LARSON, *supra* note 2, § 72.31(b).

[31] 418 So. 2d at 826.

[32] The Mississippi Supreme Court has held numerous parties to be immune from common law negligence suits. Among the parties held to have immunity are: (1) co-employees: McCluskey v. Thompson, 363 So. 2d 256, 259 (Miss. 1978); (2) corporate officers:

In another 1982 decision, *Taylor v. United States Fidelity & Guaranty Co.*,[33] the Mississippi Supreme Court added compensation carriers to the list of persons held to be immune from tort suits by injured employees.[34] The plaintiff in *Taylor* suffered a job-related injury for which he did not receive benefits.[35] The plaintiff then brought suit seeking compensatory and punitive damages against USF&G and two of its employees, contending they had exercised bad faith in failing to process his claim.[36]

The Mississippi Supreme Court held that the state legislature had not intended injured employees to recover damages for bad faith actions on the part of compensation carriers and refused to allow the plaintiff to proceed with his suit.[37] The court noted that the Act provides a means by which the employee could seek recourse for the defendant's alleged bad faith actions.[38] A provision of the Act provides for a ten percent penalty for failing to pay benefits within a prescribed period.[39] The court held that because the alleged injury to the plaintiff was compensable under the Act, the Act should be the plaintiff's exclusive remedy.[40] The *Taylor* decision completely ignores decisions by other courts holding that similar provisions did not bring similarly compensable injuries within the scope of a workmen's compensation act. Under these decisions, the workmen's compensation act was held not to be the plaintiff's exclusive remedy.[41] The *Taylor* rationale ap-

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Brown v. Estess, 374 So. 2d 241, 242-43 (Miss. 1979); (3) both employers in a dual employment situation: Ray v. Babcock & Wilcox Co., 388 So. 2d 166, 168 (Miss. 1980) *noted in* 51 MISS. L.J. 623 (1980-1981); Robertson v. Stroup, 254 Miss. 118, 125, 180 So. 2d 617, 620 (Miss. 1965); and (4) prime contractor in situations where the subcontractor carried no compensation insurance: Mosley v. Jones, 224 Miss. 725, 732-33, 80 So. 2d 819, 821 (1955).

[33] 420 So. 2d 564 (Miss. 1982).

[34] *Id.* at 566.

[35] *Id.* at 565.

[36] *Id.*

[37] *Id.* at 566.

[38] *Id.* n.1. The court was referring to MISS. CODE ANN. § 71-3-37(5) (1972).

[39] MISS. CODE ANN. § 71-3-37(5) (1972).

[40] 420 So. 2d at 566.

[41] *See, e.g.*, Martin v. Travelers Ins. Co., 497 F.2d 329, 331 (1st Cir. 1974) (late payment penalty provision of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 914 (1976), held not to be exclusive remedy when the carrier intentionally acted in bad faith); Stafford v. Westchester Fire Ins. Co., 526 P.2d 37, 43-44 (Alaska 1974) (Alaska's provision for penalty for late payment of benefits, ALASKA STAT. § 23.30.155(e) (Supp. 1982), not the exclusive remedy when carrier intentionally acted in bad faith); Coleman v. American Universal Ins. Co., 86 Wis. 2d 615, 273 N.W.2d 220, 224 (1979) (Wisconsin's penalty provision for late payment of benefits, WIS. STAT. ANN. §

pears to be an attempt to stretch this provision of the Act far past its intended purpose.

The court, in *Taylor*, relies on several cases that may be distinguished from the question under consideration.[42] The alleged actions of the defendant in *Taylor* constitute a separate injury that is not compensable under the Act.[43] By stretching the Act to cover the separate injury, the court has effectively given compensation carriers immunity in "bad faith" suits, granting carriers authority to take an aggressive position in their dealings with injured workers without fear of recourse.

II. Attorney Advertising

Restrictions on attorney advertising,[44] already subjected to constitutional criticism by the United States Supreme Court,[45] were likewise

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102.22 (Supp. 1982), not the exclusive remedy when carrier intentionally acted in bad faith).

[42] The court relied primarily on Sullivan v. Liberty Mut. Ins. Co., 367 So. 2d 658 (Fla. Ct. App.), *cert. denied*, 378 So. 2d 350 (Fla. 1979), and Noe v. Travelers Ins. Co., 172 Cal. App. 2d 731, 342 P.2d 976 (1959). Because these cases deal with the aggravation of an existing job-related injury because of the carrier's failure to authorize medical treatment, the court's reliance upon them is misplaced. The court quotes Professor Larson's treatise on workmen's compensation, *see* 2A A. Larson, *supra* note 2, § 72.97, for further support. 420 So. 2d at 566. In so doing, the court completely ignores Professor Larson's comments concerning intentional torts committed by compensation carriers. Professor Larson has stated:

> Now we would have a stark presentation of the real question: how can a compensation act, which deals only in personal injuries, exclude a tort action that is not concerned at all with personal injuries, but only with emotional distress? Suppose the investigator in *Unruh* [v. Truck Ins. Exch., 7 Cal. 3d 616, 102 Cal. Rptr. 815, 498 P.2d 1063 (1972)] had slandered claimant on one of their dates, shouting to a roomful of people in a night club that claimant was a bank robber, a murderer, and a two-dollar whore. Could an action for slander, asking damages only for injury to reputation, have been defeated on the ground that the incident grew out of an investigation of a compensation claim, and would not have happened but for the compensable injury?
>
> The questions answer themselves. Plainly the existence of a compensation claim does not give insurers or employers a blanket exemption from the entire law of tort.

2A A. Larson, *supra* note 2, at § 68.34.

[43] The definition provided in Miss. Code Ann. § 71-3-3(b) (Supp. 1982) for the term "injury" includes "an injury caused by the willful act of a third person directed against an employee because of his employment while so employed and working on the job." This provision does not appear to include injuries of emotional distress such as the injury at issue in *Taylor*.

[44] Restrictions on attorney advertising, whether formal, written prohibitions, or informal traditions, have existed for years. *See* 52 Miss. L.J. 679, 680-85 (1982).

[45] *See In re* R.M.J., 455 U.S. 191, 207 (1982) (attorney advertising in publications

dealt another setback by the Mississippi Supreme Court in *McLellan v. Mississippi State Bar Association.*[46] McLellan, a Jackson attorney,[47] placed an advertisement in the Jackson, Mississippi telephone directory "Yellow Pages."[48] The Mississippi State Bar Association brought disciplinary proceedings against McLellan, alleging that he had violated several provisions of the Code of Professional Responsibility.[49] The Complaint Tribunal ruled against McLellan and he appealed its decision, contending that the applicable provisions of the Code of Professional Responsibility violated his constitutional rights.[50]

After discussing the United States Supreme Court's recent decisions in *Bates v. State Bar*[51] and *In re R.M.J.*,[52] the court stated:

> While we recognize, as was held in *Bates* and *In re R.M.J., supra,* that the Bar may regulate advertising and impose discipline where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has proved to be deceptive in the past, we are of the opinion that the complete elimination and blanket prohibition of advertising in the "Yellow Pages" of the telephone directory are constitutionally impermissible, and the sections of the Code of Professional Responsibility so prohibiting same here are held to be so.[53]

In so holding the court correctly decided the case in accordance with the constitutional directives of the United States Supreme Court.[54]

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such as the "Yellow Pages" may be regulated, but not prohibited); Bates v. State Bar, 433 U.S. 350, 384 (1977) (complete prohibition of attorney advertising in newspaper is violative of first amendment).

[46] 413 So. 2d 705 (1982).

[47] *Id.* at 709 app. I.

[48] *Id.* at 706, 709 app. I.

[49] *Id.* at 705. The defendant was accused of violating MISSISSIPPI CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101[B], DR 2-102[A][8], and DR 2-101[A].

[50] 413 So. 2d at 706. The defendant contended that certain provisions of the MISSISSIPPI CODE OF PROFESSIONAL RESPONSIBILITY, which effectively prohibited attorney advertising, were in violation of U.S. CONST. amend. I. 413 So. 2d at 706.

[51] 433 U.S. 350 (1977).

[52] 455 U.S. 191 (1982).

[53] *McLellan*, 413 So. 2d at 708.

[54] For an in-depth discussion of the *McLellan* decision, see 52 MISS. L.J. 679 (1982).

III. Intervention By Mississippi's Attorney General on Behalf of the Public

In *State v. Mississippi Public Service Commission*,[55] the state attorney general, Bill Allain, sought a ruling by the Mississippi Supreme Court upholding his right to intervene in a civil suit on behalf of the state's taxpayers even though he nominally represented the state agency against whom the appeal was taken.[56] The appeal arose from an order of the Mississippi Public Service Commission partially granting a rate increase proposed by Mississippi Power & Light Co.[57] At the Public Service Commission hearing, the attorney general appeared on behalf of the Commission and the general public.[58]

When the Public Service Commission's ruling was appealed to the Hinds County Chancery Court,[59] the attorney general filed a petition with the court seeking permission to intervene in the suit on behalf of the state of Mississippi as a ratepayer and on behalf of the state's taxpayers.[60] The chancellor took the petition under advisement and allowed the attorney general to participate in the appeal.[61] Upon reflection, the chancellor subsequently denied the attorney general's petition to intervene.[62] The attorney general appealed this ruling.[63]

As a threshold issue the court had to determine whether the attorney general had legal authority to intervene in a civil case on behalf of the public.[64] The Mississippi Code provides that the attorney general is

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[55] 418 So. 2d 779 (Miss. 1982).

[56] *Id.* at 780.

[57] *Id.*

[58] *Id.*

[59] *Id.* Appeals from an order of the Public Service Commission by any aggrieved party, other than a public utility, are made to the Chancery Court of the First Judicial District of Hinds County, Mississippi. Miss. Code Ann. § 77-3-67 (Supp. 1982).

[60] 418 So. 2d at 780. The attorney general's decision to appeal both on the state's behalf as a consumer of electricity, and on behalf of the taxpayers as the ultimate purchasers of this electricity, appears to be an attempt to stem any efforts to deny his intervention in the matter on the basis of standing. Courts in other jurisdictions have drawn distinctions as to an attorney general's standing in a suit based upon the capacity in which he chooses to intervene. *See, e.g.*, State *ex rel.* Shevin v. Yarborough, 257 So. 2d 891, 893 (Fla. 1972) (attorney general could represent the state *qua* consumer but had no standing to represent the general public). Although this preventive tactic proved to be unnecessary, it may have been a factor in the court's decision not to discuss the issue of standing. *See infra* note 74 and accompanying text.

[61] 418 So. 2d at 781.

[62] *Id.*

[63] *Id.*

[64] *Id.* at 782.

"the chief legal officer and advisor for the state"[65] and also that he has "the powers of the attorney general at common law."[66] Traditionally, most courts, including Mississippi's, have held that the attorney general could intervene for the protection of public rights at common law.[67] At least one court, however, has held that an attorney general may not intervene on behalf of the public when the attorney general's common law power to represent the public has been statutorily granted to a specific administrative body of the state government.[68] The rationale of this court was that the attorney general was statutorily prohibited from having any influence in the administrative agency's decision;[69] thus, he could not circumvent such a legislative directive by intervening in its decisions on behalf of the public.[70] In Mississippi, however, the attorney general is required by statute to represent the Public Service Commission.[71] Therefore, the rationale supporting nonintervention does not appear to obstruct the traditional Mississippi view that the attorney general may intervene on behalf of the public.[72]

Under Mississippi's statutory scheme the court properly held that the attorney general had the legal authority to intervene in the suit.[73] But the court chose not to rule on the question of whether the attorney general had standing to intervene in this particular case. The court, instead, presumed the attorney general had standing and chose to leave the question for another case.[74]

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[65] MISS. CODE ANN. § 7-5-1 (1972).

[66] *Id.*

[67] *See* Gandy v. Reserve Life Ins. Co., 279 So. 2d 648, 649 (Miss. 1973) (intervention to restrain insurance premium increases); State v. Public Serv. Comm'n, 129 Mont. 106, 283 P.2d 594, 599 (1955) (telephone rate increases); *In re* Public Serv. Coordinated Trans., 5 N.J. 196, 74 A.2d 580, 586 (1950) (public transportation); Teleco, Inc. v. Corporation Comm'n, 649 P.2d 772, 773 (Okla. 1982) (public utilities). *See generally* THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, ATTORNEY GENERALS' INTERVENTION BEFORE REGULATORY AGENCIES 7-8 (1975) (generally recognized that attorney general may, in the exercise of his common law powers, intervene in all suits or proceedings which concern the general public) [hereinafter cited as NATIONAL ASSOCIATION].

[68] State v. Missouri Pub. Serv. Comm'n, 352 Mo. 29, 175 S.W.2d 857, 862 (1943).

[69] *Id.*

[70] *Id.*

[71] MISS. CODE ANN. § 77-3-9 (1972).

[72] Indeed, the Mississippi Supreme Court specifically pointed out that the attorney general was required to represent the Public Service Commission by statute. 418 So. 2d at 780.

[73] 418 So. 2d at 782; *see supra* note 67 and accompanying text.

[74] 418 So. 2d at 784. The issue of an attorney general's standing to bring suit on behalf of the general public is generally approached on two separate grounds. One approach, used by the attorney general in the instant case, involves intervening on behalf

The next issue raised by the case dealt with the attorney general's apparent conflict of interest.[75] The possibility of conflict resulted from the attorney general's appointment of an assistant attorney general to represent the Public Service Commission,[76] coupled with the attorney general's appearance at the Public Service Commission's hearing at which he announced his intention to represent both the Commission and the public.[77] The court disposed of this question by reasoning that the relationship between the attorney general and a state administrative agency is not of the same nature as that of private counsel and client.[78] The court also recognized the inherent conflicts incurred by an attorney general as a result of his unique position[79] and determined that such a conflict should not prohibit the attorney general from act-

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of the state *qua* consumer and, ultimately, on behalf of the general public as taxpayers. This distinction has been recognized by some courts. *See, e.g.,* State *ex. rel.* v. Yarborough, 257 So. 2d 891, 893 (Fla. 1972) (attorney general could represent the state as a consumer of electrical services but not as a champion of the general public); State v. Missouri Pub. Serv. Comm'n, 352 Mo. 29, 175 S.W.2d 857, 862 (1943) (attorney general could intervene only when the state had a pecuniary interest).

Another approach used to gain standing is by intervening as the parens patriae of the state's citizens, which is, in essence, an attempt to represent the state's "quasi-sovereign" interest in a particular matter. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico, 102 S.Ct. 3260, 3266 (1982). Such a suit, however, must be based upon more than a state-aided pursuit of a purely private interest. *Id.* Intervention on parens patriae grounds must be based upon a quasi-sovereign interest in the health, or welfare—either physical or economic—of the state's citizens. *Id.* at 3269; *see also* Pennsylvania v. West Virginia, 262 U.S. 553, 592 (1923) (state's grave concern for the loss of natural gas involved the welfare of the people and made the state more than a nominal party). *But see* Hawaii v. Standard Oil Co., 405 U.S. 251, 263-64 (1972) (state could not sue as parens patriae of its citizens when the interest to be protected was the "general economy" of the state). *See generally* NATIONAL ASSOCIATION, *supra* note 67, at 10-12 (discussion of attorney general's use of the parens patriae doctrine).

[75] 418 So. 2d at 782.

[76] *Id.* at 780.

[77] *Id.*

[78] *Id.* at 782.

[79] *Id.* at 781-82. Other courts have likewise recognized these inherent conflicts. *See* Connecticut Comm'n on Special Revenue v. Connecticut Freedom of Information Comm'n, 174 Conn. 308, 387 A.2d 533, 537-38 (1978) (conflict between interests of the state and its agencies); EPA v. Pollution Control Bd., 69 Ill. 2d 394, 372 N.E.2d 50, 52-53 (1977) (conflict resulting from attorney-client relationship with both state and state agencies); Feeney v. Commonwealth, 373 Mass. 359, 366 N.E.2d 1262, 1266 (1977) (conflict between public interest, public officials, and the interest of the state). *See generally* NATIONAL ASSOCIATION, *supra* note 67, at 25-28 (discussion of conflict between attorney general's obligation to represent the public interest and his duty to represent state agencies and boards).

ing on behalf of the public.[80]

The practical effect of this decision may not become apparent for some time. Whether it will spawn further consumer activism on the part of the attorney general will probably be determined by the particular attorney general more than by the court's willingness to allow him to intervene in state administrative rulings on behalf of the public. In any event, the court's silence on the question of standing may well provide an opportunity for the court to restrict the attorney general's ability to intervene in the future.[81]

W. Thomas Siler, Jr.

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[80] 418 So. 2d at 783-84; *see also* Connecticut Comm'n on Special Revenue v. Connecticut Freedom of Information Comm'n, 174 Conn. 308, 387 A.2d 533, 537-38 (1978) (attorney general allowed to intervene despite conflict); EPA v. Pollution Control Bd., 69 Ill. 2d 394, 372 N.E.2d 50, 52-53 (1977) (same); Feeney v. Commonwealth, 373 Mass. 359, 366 N.E.2d 1262, 1266 (1977) (same). *Contra* City of York v. Pennsylvania Pub. Util. Comm'n, 449 Pa. 136, 295 A.2d 825, 832 (1972) (intervention would create an irrevocable conflict of interest); Teleco, Inc. v. Corporation Comm'n, 649 P.2d 772, 773 (Okla. 1982) (until relieved from his duty, attorney general must stand as counsel for the agency).

[81] *See supra* note 74 and accompanying text.

CIVIL PROCEDURE

The Mississippi Supreme Court decided a number of cases during the 1982 term concerning civil procedure but only two merit textual treatment.[1] Also, in 1982, the legislature responded to the supreme

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[1] Cunningham v. Cunningham, 423 So. 2d 136, 138 (Miss. 1982) (appeal from judgment dismissed because of failure to perfect appeal within statutory time limit); Dunaway v. W. H. Hopper & Assocs., Inc., 422 So. 2d 749, 751-52 (Miss. 1982) (dismissal of action on basis of res judicata or collateral estoppel was error when the causes of action, classes of action, classes of litigants, and factual issues were not the same); City of Wiggins v. Breazeale, 422 So. 2d 270, 272 (Miss. 1982) (chancery court has concurrent jurisdiction with governing authorities of municipalities to close city streets); Eidt v. City of Natchez, 421 So. 2d 1225, 1231 (Miss. 1982) (when trial court or administrative agency takes judicial notice of facts, fairness and due process require that notice be afforded to the parties affected); Wright v. Mayor of Jackson, 421 So. 2d 1219, 1223 (Miss. 1982) (lower court erroneously granted rezoning when no clear and convincing proof that a substantial change in neighborhood occurred and no public need for rezoning existed); Phillips Constr. Co. v. Mississippi State Highway Comm'n, 420 So. 2d 1374, 1376 (Miss. 1982) (appeal under a supersedeas bond is not perfected until bond is approved by circuit judge and filed); Rhodes v. Rhodes, 420 So. 2d 759, 761 (Miss. 1982) (trial court should not discipline attorneys for misconduct outside of their professional capacity; chancellor erred in barring appellant from practicing law in chancery court until appellant paid delinquent child support payments); Square D Co. v. Edwards, 419 So. 2d 1327, 1329 (Miss. 1982) (failure to supplement interrogatories to reveal identity, as well as substance of the testimony of an expert witness, may result in exclusion of expert's testimony); Matthews v. Watkins Motor Lines, 419 So. 2d 1321, 1323-24 (Miss. 1982) (defendant's advance payments to plaintiff should be affirmatively pled); Hobbs v. Greeley, 419 So. 2d 586, 588 (Miss. 1982) (opinion, order, and mandate set aside and case restored to pending status because of failure to serve party with copy of motion to reinstate the appeal, the brief of attorney general's office, or the assignment of error); Smith v. Sullivan, 419 So. 2d 184, 188 (Miss. 1982) (administrative commission's order will be affirmed on appeal when supported by substantial evidence); *In re* Branan, 419 So. 2d 145, 146 (Miss. 1982) (multiple sanctions, not including restitution, may be imposed against any justice or judge pursuant to MISS. CONST. art. VI, § 177A, if the acts of the justice or judge constitute more than one of the proscribed categories of conduct set forth in § 177A); Ferris v. Hawkins, 418 So. 2d 811, 814 (Miss. 1982) (directed verdict in replevin action for money judgment erroneous when trial court failed to make finding regarding who was entitled to possession of property); Bornaschella v. Orcutt, 418 So. 2d 768, 772 (Miss. 1982) (divorce settlement hearing may be conducted and a decree entered in vacation on date different from that set forth in divorce decree if adequate notice is given); Hutchinson v. Smith, 417 So. 2d 926, 928 (Miss. 1982) (when legal malpractice claim sounds in tort, rather than contract, the six-year statute of limitations applies); Mississippi Gulf Coast Bldg. & Constr. Trades Council v. Brown & Root, Inc., 417 So. 2d 564, 566-67 (Miss. 1982) (jurisdiction to issue injunction to regulate picketing not pre-empted by the National Labor Relations Act when conduct and language of the strikers is intimi-

dating and likely to cause violence); Mabry v. Day-Brite Lighting Div., 416 So. 2d 677, 678-79 (Miss. 1982) (writ of mandamus proper remedy when circuit court judge had not taken the case under advisement or set a final due date for the filing of briefs); Woods v. Nichols, 416 So. 2d 659, 672 (Miss. 1982) (judgment of jury did not evince bias or prejudice sufficient to warrant reversal); Sims v. Board of Trustees, 414 So. 2d 431, 434 (Miss. 1982) (school board bears burden of proof on charges of insubordination and lack of cooperation on part of teacher); Pittman v. Currie, 414 So. 2d 412, 423 (Miss. 1982) (two-year statute of limitations to cancel tax title not applicable when there is a void tax sale and tax sale purchaser has not taken possession); Leathers v. Gardner, 413 So. 2d 1390, 1391 (Miss. 1982) (all parties to the proceeding must be served with process before writ of mandamus can be issued); McLeod v. Whitten, 413 So. 2d 1020, 1024 (Miss. 1982) (verdict and judgment indicate jury not confused or misled by alleged conflict in instructions; no error in lower court's refusal to grant peremptory instruction to appellant when facts made an issue of liability for jury); Fishboats, Inc. v. Welzbacher, 413 So. 2d 710, 715 (Miss. 1982) (physician is competent witness for testifying on other than privileged communications); Francis v. Francis, 413 So. 2d 382, 384 (Miss. 1982) (process by publication pursuant to MISS. CODE ANN. § 13-3-19 (1972) must be strictly complied with to find that process was served on nonresident defendants); *In re* Anderson, 412 So. 2d 743, 746 (Miss. 1982) (Mississippi Supreme Court makes dispositive decision to censor or remove judge pursuant to rule 10E of Mississippi Commission of Judicial Performance); Saunders v. Mullins, 412 So. 2d 245, 246 (Miss. 1982) (absent allegation of a municipal policy, custom, or act that may be fairly said to represent official policy, demurrers to a cause of action pursuant to 42 U.S.C. § 1983 (1976) for deprivation of civil rights under the fourteenth amendment should be sustained); Deas v. Andrews, 411 So. 2d 1286, 1291-93 (Miss. 1982) (order of introducing evidence left to discretion of trial judge, and unless arbitrary or prejudicial, not grounds for reversal; no error in failing to grant jury instructions that are abstract in nature and not predicated upon facts in evidence; damage award not so excessive as to evince bias, passion, or prejudice on part of jury); Campbell v. C & H Transportation Co., 411 So. 2d 1284, 1285 (Miss. 1982) (when sole party in interest under wrongful death statute sues and recovers judgment for all damages, the cause of action for other interested plaintiffs is thereby terminated); Dorsey v. Johnson, 411 So. 2d 1282, 1283-84 (Miss. 1982) (peremptory instruction erroneous when evidence is conflicting); Gettis v. McAlister, 411 So. 2d 770, 771-72 (Miss. 1982) (widow's renunciation of will prior to probate served as notification of her election to other interested parties); Johnson Ltd., Inc. v. Signa, 410 So. 2d 1320, 1321 (Miss. 1982) (trial court did not abuse discretion by dismissing appeal when appellant failed to prosecute appeal within 60 days and offered no justification or excuse for tardiness; court correct in assessing statutory damages of 15% against appellant for failing to prosecute appeal); Central Grain & Supply Co. v. Jesco, Inc., 410 So. 2d 879, 881 (Miss. 1982) (plaintiff's failure to file a declaration within 30 days pursuant to statute not grounds for dismissal when defendant suffered no prejudice and retrial would involve considerable expense and time; materialman's lien established by trial court set aside when plaintiff did not file within one year after indebtedness became due and payable); Wade v. Bonner, 409 So. 2d 1333, 1335 (Miss. 1982) (peremptory instruction properly refused when evidence supported jury's finding of liability and court did not abuse discretion in entering remittitur); Andrews v. Waste Control, Inc., 409 So. 2d 707, 710-11 (Miss. 1982) (chancery has jurisdiction to enjoin the prosecutions for the violation of road weight limit when waste removal company's property rights were interfered with by repeated prosecutions under a void ordinance); Huff v. Polk, 408 So. 2d 1368, 1371 (Miss. 1982) (trial court erred in overrul-

court's adoption[2] of the Mississippi Rules of Civil Procedure, which took effect January 1, 1982.[3]

I. Legislative and Judicial Action on the Rules

During the 1982 legislative session, the Mississippi Legislature passed Senate Bill No. 2714, which purports to give the legislature final authority for approving any rule promulgated by the supreme court by requiring the court to submit the proposed rule to the legislature thirty days prior to the end of the legislative session.[4] If the legislature fails to take action within the thirty-day period, the pending rule will go into effect.[5]

On March 8, 1982, the court deleted rule 14, which governed third-party practice, and amended rule 4 by reinstituting the prior statutory procedure for service of process.[6] The remainder of the rules were submitted to the legislature for advice and consent, but the court reserved ruling on the constitutionality of Senate Bill No. 2714.[7]

As the legislative session drew to a close, the legislature disapproved rules 3, 12, 13, 41, 47, 49, 56, and 83.[8] Chief Justice Patterson responded to the legislature's action with a letter to all county, circuit,

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ing appellant's objection when appellee did not file supplemental responses to interrogatories concerning the testimony of expert witnesses in sufficient time for appellant to prepare regarding the expert's testimony); McDaniel v. Mississippi Power & Light Co., 407 So. 2d 112, 114 (Miss. 1982) (trial court did not abuse discretion by allowing defendant's employee to testify about his personal knowledge, rather than any expertise he had regarding defendant's compliance with safety codes, when that employee had not been listed as an expert and his testimony substantially reiterated the testimony of defendant's expert witness); Sartain v. State, 406 So. 2d 43, 44 (Miss. 1981) (trial court's dismissal of appeal and ordering of writ of procedendo to municipal court was abuse of discretion when appeal was properly perfected and plaintiff's absence from docket call was justifiably explained and did not result from wilful neglect or bad faith).

[2] Miss. Sup. Ct. Order of May 26, 1981, Miss. Cases 395-397 So. 2d 1 (1981). The adoption of these rules effectively overruled all prior inconsistent statutes or court rulings. *Id.*

[3] For a discussion of the history of the adoption of the rules prior to the 1982 legislative session, see *Forward* to *Symposium on Mississippi Rules of Civil Procedure*, 52 Miss. L.J. 1 (1982) and *1981 Mississippi Supreme Court Review*, 52 Miss. L.J. 399, 400-05 (1982).

[4] Act of March 3, 1982, ch. 321, § 2, 1982 Miss. Laws 117 (codified as amended at Miss. Code Ann. § 9-3-71 (Supp. 1982)).

[5] Miss. Code Ann. § 9-3-71 (Supp. 1982).

[6] Miss. Sup. Ct. Order of Mar. 8, 1982, Miss. Cases 410-416 So. 2d XXI (1982). The effective date of the modification in the rules was May 1, 1982.

[7] Miss. Sup. Ct. Order of Mar. 5, 1982 (unpublished).

[8] S. Con. Res. 617, 1982 Reg. Sess.

and chancery judges stating that the Mississippi Rules of Civil Procedure, as amended by the March 8, 1982, order, would remain in full force and effect until further order from the court.[9] The legislature has taken no further action on the rules.

II. Judicial Decisions

The new rules of civil procedure became effective on January 1, 1982, but because of the lengthy appeals process, no cases construing any of the rules were decided by the supreme court. Two opinions, however, were rendered during 1982 that warrant discussion.

In *Glenn v. Herring*,[10] the supreme court examined section 11-1-17 of the Mississippi Code,[11] a procedural statute that requires trial judges to render opinions and issue judgments in matters taken under advisement. *Glenn* arose from a lawsuit filed in the Chancery Court of Jones County. The chancellor took the case under advisement, and because an opinion was not rendered within six months, an appeal was taken to the Mississippi Supreme Court under the provisions of section 11-1-17.[12]

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[9] Letter from Chief Justice Neville Patterson (April 6, 1982), *reprinted in* MISS. LAW., Mar.-Apr. 1982, at 8, 8.

[10] 415 So. 2d 695 (Miss. 1982).

[11] MISS. CODE ANN. § 11-1-17 (1972) provides:

> All chancellors or judges of the chancery and circuit courts of the state of Mississippi shall render their final decree on any and all matters taken under advisement by such chancellors or judges not later than six (6) months after the date when same are taken under advisement or not later than six (6) months after the date on which the chancellors or courts or judges set as a date for the final brief or memoranda of authority is required to be filed on or as to the cause taken under advisement, whichever is the latest date after the date on which the cause or case is taken under advisement.
>
> In the event a final decree has not been entered within the six months period hereinbefore referred to, then any party to said law suit shall have the right to appeal on the record as otherwise provided the same as if a final decree has been rendered adversely. Said appeal shall be to the supreme court of the state of Mississippi and shall be treated as a preferred case over other cases except election contests.

[12] 415 So. 2d at 696. Section 11-1-17 has been used most frequently to perfect appeals from the chancery court. *See, e.g.*, Beall v. Beall, 310 So. 2d 706, 707 (Miss. 1975) (party in divorce proceeding perfecting appeal pursuant to § 11-1-17 obtains status of appellant); Horton v. Horton, 301 So. 2d 305, 306 (Miss. 1974) (merits of divorce proceeding determined after party appealed pursuant to § 11-1-17). Section 11-1-17 first appeared as MISS. CODE ANN. § 1650.5 (1942), which required chancellors and circuit judges to render decisions on matters taken under advisement within six months. In McMahon v. Milam Mfg. Co., 242 Miss. 71, 89-90, 127 So. 2d 647, 655, *rev'd on other grounds*, 368 U.S. 7 (1961), the court held that this statute did not invalidate a decree

The supreme court noted that although the purpose of section 11-1-17 was to shorten litigation between parties, this objective had not been achieved for five reasons. First, because the statute provides no time limit within which to appeal, a final decision in any case may be indefinitely delayed. Second, the party appealing under the statute is responsible for prepaying the expense of the trial record and the costs of appeal. Third, parties are often hesitant to appeal in cases involving a factual issue because the appealing party is artificially placed in the position of appealing a final adverse decree. Fourth, a party may be reluctant to appeal under the statute because he would not want to incur the possible displeasure of the trial judge. Finally, factual issues would be determined by the supreme court acting as a trial court rather than as an appellate court.[13]

The court observed that appeals made pursuant to section 11-1-17 prevented parties from having their rights litigated in a trial forum because if a matter was taken under advisement and not acted upon by the trial court within six months, an appeal was compelled under the statute, even though a party might not have appealed had a decision been rendered.[14] To adjudicate the factual issues involved, the supreme court would be required to function as a trial court contrary to the mandate of section 146 of the Mississippi Constitution.[15]

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rendered after the six-month period. The statute was amended in 1968 to include the second paragraph of § 11-1-17. Act of Aug. 7, 1968, ch. 334, § 1, 1968 Miss. Laws 461-62. In Riley v. Richardson, 258 So. 2d 419, 420 (Miss. 1972), the court held that chancellors and circuit judges did not have jurisdiction to render a decree after a party had perfected an appeal to the supreme court for a decision on the merits. The apparent demise of this statute and possible foreshadowing of the instant case was seen in Woods v. Lee, 390 So. 2d 1010 (Miss. 1980), and Beane v. Bowden, 399 So. 2d 1358 (Miss. 1981). In *Woods*, the trial judge failed to rule on a motion for judgment notwithstanding the verdict, which was taken under advisement. The supreme court held that an application for a writ of mandamus was the proper remedy and not an appeal pursuant to § 11-1-17. 390 So. 2d at 1012. In *Beane*, the court did decide a case on the merits after a party appealed under § 11-1-17, but expressed reservation over whether jurisdiction, which was not challenged by the appellee, was proper. 399 So. 2d at 1359.

[13] 415 So. 2d at 696.

[14] *Id.* at 697. The court observed that a trial court abdicated a part of its judicial function when it failed to render a decision on cases presented, and thereby allowed § 11-1-17 to elevate this abdication of the judicial process to the status of an unfavorable decision subject to review by the supreme court. 415 So. 2d at 698.

[15] MISS. CONST. art. 6, § 146, provides, "The Supreme Court shall have such jurisdiction as properly belongs to a court of appeals." The court has reaffirmed the constitutional grant of appellate jurisdiction. *See, e.g.*, White v. State, 159 Miss. 207, 211, 131 So. 96, 97 (1930) (because supreme court is an appellate court, it is without jurisdiction to review a decision of the circuit court to decline to pass on writ application); Illinois Central R.R. v. Dodd, 105 Miss. 23, 43-44, 61 So. 743, 744 (1913) (appellate jurisdiction nec-

Recognizing that the result sought by the legislature through their enactment of section 11-1-17 could be achieved without requiring the supreme court to act as a trial court, the majority in *Glenn* adopted Supreme Court Rule 47.[16] This rule authorizes any party in a lawsuit to apply to the supreme court for a writ of mandamus which, if issued, would require the lower court to render a decision on the matters taken under advisement within six months. The decision would serve as a basis for review by the supreme court on appeal.[17] The court emphasized that rule 47 was "purely procedural"[18] and did not affect substantive law.[19]

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essarily implies that the subject matter has already been instituted and acted upon by another court, whose judgment is to be reviewed); Yazoo & Miss. Valley R.R. v. Wallace, 90 Miss. 609, 614, 43 So. 469, 470 (1907) (unconstitutional for a statute to give supreme court original, instead of appellate jurisdiction).

[16] MISS. SUP. CT. R. 47 provides:

> If a trial judge in a civil case fails to render an opinion, ruling or finding within six months after taking a case under advisement or deferring such ruling or finding, any party in the case may apply to the Supreme Court for a writ of mandamus to compel the trial judge to render a decision on the matter taken under advisement or deferred. Application for a writ of mandamus must be made within forty-five (45) days after the expiration of six months from the date the case was taken under advisement by the trial judge. However, in cases taken under advisement by a trial judge before May 15, 1982, in which no opinion is rendered within six months after the date the case was taken under advisement, any party in such cases shall have until December 31, 1982, to apply for a writ of mandamus.
>
> If the party who filed the original complaint fails to apply for a writ of mandamus within the time prescribed, the complaint shall stand dismissed without prejudice. If a party who has filed a counterclaim or a cross-claim fails to apply for a writ of mandamus within the time prescribed, the counterclaim or cross-claim shall stand dismissed without prejudice.
>
> Application for a writ of mandamus by the party who filed the original complaint shall not relieve the party who filed a counterclaim or cross-claim from applying for a writ of mandamus within the time prescribed. Neither shall the application for a writ of mandamus by the party filing a counterclaim or cross-claim relieve the party filing the original action from applying for a writ of mandamus within the time prescribed. The party filing a complaint and the party filing a counterclaim or cross-claim may join in the application for a writ of mandamus.

[17] 415 So. 2d at 698. The court observed that appellate jurisdiction, as conferred by § 146 of the constitution, includes the issuance of procedural orders or writs, such as the writ of mandamus, to inferior courts to aid in the appellate process. *Id.* at 698; *see also* State v. Maples, 402 So. 2d 350, 352 (Miss. 1981) (function of remedial writs issued by superior court to inferior court is to aid in appellate process); Boydstun v. Perry, 249 So. 2d 661, 663 (Miss. 1971) (jurisdiction over writ proceedings vested in supreme court).

[18] 415 So. 2d at 699.

[19] *Id.* The court relied on the reasoning in Newell v. State, 308 So. 2d 71 (Miss.

The majority stated that rule 47 would provide a method by which a final decision could be obtained within a specified time period on matters taken under advisement, thereby increasing the efficiency of the judicial process.[20] The court dismissed the appeal and remanded the case for further proceedings consistent with the opinion.[21]

Justice Bowling, joined by Justice Roy Noble Lee, dissented, contending that section 11-1-17 dealt with substantive law rather than with procedural matters.[22] While recognizing the defects in section 11-1-17, Justice Bowling argued that any changes made to the statute should be made by the legislature and not by the supreme court.[23]

Justice Dan Lee also filed a dissenting opinion, in which he questioned the authority of the court to enact rule 47. Justice Lee argued that because rule 47 was "diametrically opposed"[24] to section 11-1-17, and because both the rule and the statute deal with the same subject matter, adoption of the rule would create confusion among practioners and judges.[25] Justice Lee also argued that the case should be remanded to the chancellor with directions to make findings of fact and to render

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1975), to promulgate this new rule. 415 So. 2d at 696. The *Newell* court held that the supreme court had the power to devise procedural rules when legislative suggestions concerning procedure were determined to be an impediment to justice or an impingement upon the constitution. 308 So. 2d at 76; *see also* Southern Pac. Lumber Co. v. Reynolds, 206 So. 2d 334, 335 (Miss. 1968) (phrase "judicial power" in § 144 of the constitution included the power to make rules of practice and procedure to dispose of judicial business efficiently).

[20] 415 So. 2d at 699. The court enumerated six reasons why rule 47 remedied the deficiencies found in § 11-1-17:

> (1) Rule 47 fixes a definite time period, 45 days, within which any party can apply for the writ in order to obtain a final decision;
>
> (2) the expenses of prepaying the costs for a trial record would be avoided as neither party would be forced to appeal;
>
> (3) a party applying for the writ would not be positioned as an "appellant" appealing as if a final decree had been rendered;
>
> (4) the possible displeasure of a trial judge would be avoided because the trial judge would understand that a party would be required to apply for a writ of mandamus in order to avoid a dismissal of their case;
>
> (5) where a counterclaim or cross-claim had been filed, the party counterclaiming and the original party would both be responsible to apply for a writ of mandamus in order to avoid dismissal of their claims;
>
> (6) factual issues would be properly determined by the trial court.

Id.

[21] *Id.* at 700.

[22] *Id.*

[23] *Id.* at 701.

[24] *Id.* at 702.

[25] *Id.*

a final decision within a suggested sixty- to ninety-day time limit fixed by the court pursuant to section 11-3-7.[26] He concluded that any rule adopted by the court should be a part of the Mississippi Rules of Civil Procedure and should be submitted to the legislature for approval in accordance with sections 9-3-61 and 9-3-71 of the Code.[27]

Although the court did not expressly hold that section 11-1-17 was unconstitutional, the procedure that section 11-1-17 provides, regarding matters taken under advisement by a lower court, is certainly questionable in light of *Glenn* and the court's adoption of rule 47. Apparently, the safer route for practicing attorneys to follow when a matter is taken under advisement and no decision is rendered within six months is the procedure outlined by the court in *Glenn*. Attorneys should apply for a writ of mandamus to be issued by the supreme court compelling the lower court to render a final decision, which could then be reviewed on appeal by the supreme court in exercise of its appellate jurisdiction.[28]

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[26] *Id.* MISS. CODE ANN. § 11-3-7 (1972) provides:

> The supreme court shall hear and determine all cases properly brought before it at the return term, unless cause be shown for a continuance; and in case the judgment, sentence, or decree of the court below be reversed, the supreme court shall render such judgment, sentence, or decree as the court below should have rendered, unless it be necessary, in consequence of its decision, that some matter of fact be ascertained, or damages be assessed by a jury, or where the matter to be determined is uncertain; in either of which cases the suit, action or prosecution shall be remanded for a final decision; and when so remanded, shall be proceeded within the court below acording to the direction of the supreme court, or according to law in the absence of such directions.

Although this statute authorizes the supreme court to remand a case to a lower court with an order providing for time limitations, it also indicates that cases are to be remanded for additional findings of fact or for further proceedings only when a final judgment has been appealed.

[27] 415 So. 2d at 704. MISS. CODE ANN. §§ 9-3-71, -61 became effective March 3, 1982. These statutes amended Act of Apr. 7, 1975, ch. 501, § 15, 1975 Miss. Laws 789 and Act of Apr. 7, 1975, ch. 501, § 20, 1975 Miss. Laws 790-91, respectively. *See supra* notes 4-5 and accompanying text.

Sections 9-3-61 and 9-3-71 provide that the supreme court shall have the power to promulgate the general rules of procedure in civil actions for the circuit, chancery, and county courts of the state. This power, however, is subject to legislative approval, and if a particular rule or rules are disapproved, they would thereafter be suspended and ineffective. If a rule is proposed or promulgated by the supreme court, but has not been submitted to the legislature for approval, it also shall be of no effect. By these statutes, the legislature attempted to reach a compromise between the legislative and judicial branches by giving the court the right to promulgate rules of procedure but simultaneously providing that any new rules be submitted to the legislature for approval. 415 So. 2d at 703.

[28] 415 So. 2d at 699.

The second important supreme court decision rendered during 1982 concerning civil procedure was *In re Estate of Miller*.[29] In *Miller*, the court held that a lower court comitted reversible error when it ruled on the constitutionality of a statute even though the statute had not been specially pled.[30]

The issue in *Miller* arose from a petition filed by the appellant in the Chancery Court of Choctaw County requesting that the chancellor appoint an administrator for the estate of the appellant's deceased mother and that the appellant be adjudicated the sole heir of her mother's estate.[31] At trial, the chancellor held that the Mississippi law prohibiting illegitimates from inheriting from their fathers[32] was unconstitutional, and that the appellee, an illegitimate, should inherit his father's portion of his deceased grandmother's estate.[33] The chancellor

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[29] 409 So. 2d 715 (Miss. 1982).

[30] *Id.* at 718.

[31] 409 So. 2d at 716. In the petition, the appellant, Mrs. Lena Bell Miller Watson, sought to establish herself as the sole and only heir at law of her deceased mother, Mrs. Eunie Elkins Miller, and to confirm in herself title to certain land in which she and her mother had total interest. Mrs. Watson alleged that her only brother, J.D. Miller, had died intestate, had never been married, and had no children. *Id.*

Frank Miller, who claimed to be the illegitimate son of J.D. Miller, answered the petition by denying all averments and sought an undivided one-half interest in the estate through his alleged deceased father, J.D. Miller. *Id.*

In answer to the cross-petition, Mrs. Watson denied any rights of Frank Miller to the property in question and affirmatively pled the 10-year adverse possession statute and the equitable bar of laches as defenses. *Id.*

[32] MISS. CODE ANN. § 91-1-15 (1972) provided that illegitimate children may not inherit from their father by intestate distribution unless the father subsequently marries the child's mother and acknowledges the child. Illegitimate children were allowed to inherit from their mother according to the laws of descent and distribution. Section 91-1-15 was subsequently amended by Act of April 23, 1981, ch. 529, 1981 MISS. LAWS 1616-17 (codified at § 91-1-15 (Supp. 1982)), which allowed illegitimates to inherit from both parents by intestate succession.

[33] 409 So. 2d at 717. The chancellor invalidated MISS. CODE ANN. § 91-1-15 (1972), on the basis of the United States Supreme Court's holding in Trimble v. Gordon, 430 U.S. 762 (1977). In *Trimble*, the Court found that an Illinois statute that permitted inheritance by an illegitimate from the mother, but only from the father upon an intermarriage and acknowledgment, was unconstitutional under the equal protection clause of the fourteenth amendment because legitimate children were permitted to inherit from both parents. 430 U.S. at 776.

The chancellor said:

> [Section 91-1-15] is unconstitutional to the extent that it precludes an illegitimate child from inheriting by intestate distribution from the child's father unless the father subsequently married the child's mother and then acknowledges the child as his own. Said statute is an unconstitutional denial of equal protection required by the fourteenth amendment of the United States

further held that because the appellant and appellee were the sole heirs at law of the deceased,[34] each was entitled to an undivided one-half interest in the deceased mother's estate.[35] On appeal,[36] the Mississippi Supreme Court concluded that because the constitutionality of the statute concerning inheritance rights of illegitimates was raised only on appeal, the statute was not specially pled and therefore was not properly before the court.[37] The court reversed and remanded the case for a new trial on the merits.[38]

The first and only Mississippi case to espouse the principle that the constitutionality of a statute would not be considered by the court unless specially pled was *State ex rel. Carr v. Cabana Terrace, Inc.*[39] There, the appellant asserted that the dismissal of his nuisance suit[40] because of the failure to provide affidavits, sought by the defendant pursuant to the statutes on maintenance, barratry, and solicitation,[41]

Constitution.

409 So. 2d at 717 (citation omitted).

[34] 409 So. 2d at 717.

[35] *Id.*

[36] *Id.* at 716. The following assignments of error were presented on appeal:

(1) Did the lower court err in holding that Frank Miller was the sole and only heir at law of J.D. Miller, deceased, and consequently, was entitled to an interest in the estate of Mrs. Eunie Elkins Miller, deceased; and

(2) did the lower court err in failing to hold that Mrs. Lena Bell Miller Watson was the sole and only heir at law of Mrs. Eunie Elkins Miller, deceased, and entitled to the entire estate.

Id.

[37] *Id.* at 718. The court stated, "It is well-settled that the constitutionality of a statute will not be considered unless the point is specially pleaded." *Id.* (*quoting* Pacific State Box & Basket Co. v. White, 296 U.S. 176 (1935)).

[38] 409 So. 2d at 718. In addition to the error made by the chancellor in declaring the statute unconstitutional on its own motion, the court also found that the pleading of the 10-year adverse possession statute of limitations by Mrs. Watson to bar the claim of Frank Miller did not sufficiently raise the general six-year statute of limitations applicable to bar claims by illegitimates as established in Knight v. Moore, 396 So. 2d 31, 34-35 (Miss. 1981). 409 So. 2d at 718.

[39] 247 Miss. 26, 153 So. 2d 257 (1963).

[40] Carr and six other citizens of Hinds County filed suit against Cabana Terrace, Inc., a Mississippi corporation (also known as the Patio Club), alleging that the defendants controlled a suite of rooms at the King Edward Hotel in Jackson, Mississippi, at which they sold intoxicating liquors in violation of state law. The complainants prayed for the abatement of the place as a nuisance, for an injunction to restrain defendants from further violation of the law, and for judgment of a penalty of $500 for each violation. *Id.* at 31, 153 So. 2d at 258.

[41] In addition to filing both general and special demurrers, the defendants moved, under the Mississippi laws on maintenance, barratry, and solicitation to require affidavits from the complainants. The complainants declined to file affidavits and did not

was error because the statutes were unconstitutional.[42] The court held that the constitutional issues were not raised in the trial court; therefore, the appellant could not properly raise them for the first time on appeal.[43] Thus, the court affirmed the dismissal.[44] Although the court in *Cabana* enunciated the principle that the constitutionality of a statute would not be considered unless that contention was specially pled, the reasoning of the supreme court was that because the constitutionality of the statute had not been passed on by the trial court, the constitutional issue could not be considered on appeal.[45]

Because of this distinction, *Miller* is the first Mississippi case to interpret and apply the principle that a trial court should not rule on the constitutionality of a statute unless the issue is raised in the pleadings or during the trial of the case. The declaration of a court by its own motion that a statute is unconstitutional would constitute reversible error.[46]

The United States Supreme Court decision in *Pacific States Box & Basket Co. v. White*[47] was cited by both the *Cabana* and *Miller* courts for the principle that the constitutionality of a statute must be specially pled to be considered by the court.[48] *Pacific States,* however, was decided in 1935, three years before the promulgation of the Federal Rules of Civil Procedure,[49] which provide for notice pleading.[50]

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plead that they were exempt from the execution of such affidavits; therefore, the court on motion of the defendants dismissed the action. *Id.* at 37, 153 So. 2d at 260.

[42] *Id.* at 32, 153 So. 2d at 258. The plaintiffs appealed the dismissal of the suit by the lower court, contending that the statutes requiring affidavits violated the fourteenth amendment and certain sections of the state constitution and that the statutes were, in any event, inapplicable to the proceeding. *Id.*

[43] *Id.* at 38, 153 So. 2d at 261. The supreme court relied on a previous decision, Adams v. Board of Supervisors, 177 Miss. 403, 170 So. 684 (1936), which held that the supreme court would not consider on appeal a constitutional issue not presented to the trial court. 247 Miss. at 38, 153 So. 2d at 261.

[44] 247 Miss. at 39, 153 So. 2d at 261.

[45] *Id.* at 38, 153 So. 2d at 261.

[46] *See supra* notes 38-40 and accompanying text.

[47] 296 U.S. 176 (1935).

[48] *See supra* note 38. In *Pacific States,* the Supreme Court affirmed the motion to dismiss because the challenge to the constitutionality of the state regulation under the equal protection and commerce clauses did not specifically set forth the facts relied upon to show the unconstitutionality of the regulation. The Court held that one asserting the unconstitutionality of legislative actions cannot effectively do so by making allegations that are merely general conclusions of law or fact, but must set forth specifically the facts relied upon to show the unconstitutionality of the statute or act. *Id.* at 184-85.

[49] The Federal Rules of Civil Procedure were adopted by the United States Supreme Court on December 20, 1937. The rules were then transmitted to the Congress for approval on January 3, 1938. Because the Congress adjourned without acting on the

A subsequent decision by the Ninth Circuit Court of Appeals has questioned the strict standard of pleading required by *Pacific States*. In *Jacobson v. Tahoe Regional Planning Agency*,[51] the Ninth Circuit noted that, although *Pacific States* had not been expressly overruled, it did not represent the present state of the law because *Pacific States* was decided before the promulgation of the federal rules. Furthermore, the court noted that it could find no precedent in the Ninth Circuit applying *Pacific States* to an analogous case since the rules had taken effect.[52] The court, therefore, found that under notice pleading as provided by rule 8(a) the allegations of "taking," even though phrased in terms of inverse condemnation, did sufficiently state a claim under the fifth amendment.[53] The court denied a motion to dismiss for failure to state a claim upon which relief could be granted.[54]

The adoption of the Mississippi Rules of Civil Procedure, which allow notice pleading under rule 8(a),[55] similarly cast doubt on the holding in *Miller*. Until the court provides guidelines on what is re-

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rules, the rules did not become effective until September 16, 1938. 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1004 (1969).

[50] FED. R. CIV. P. 8(a) provides:

> (a) **Claims for Relief.** A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

Commentators have stated that to question the constitutionality of a statute the party should by proper averments bring himself within the scope of the statute and specify how he has been injured, because vague allegations that one has been injured may not state a claim upon which relief can be granted. 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1234 (1969).

[51] 558 F.2d 928 (9th Cir. 1977), *aff'd in part and rev'd in part on other grounds sub nom.*, Lake Country Estates, Inc. v. Tahoe Planning Agency, 440 U.S. 391 (1979). There are cases that hold a statute must be specially pled to be properly ruled on by the court, but these decisions were made prior to the adoption of notice pleading in the particular jurisdictions. *See, e.g., In re* Wimberly Chapel Baptist Church, 170 Kan. 684, 228 P.2d 540, 543-44 (1951); State *ex rel.* Kenosha Auto Trans. Corp. v. Flanigan, 349 Mo. 54, 159 S.W. 2d 598, 599 (1942); Brown v. Waldman, 93 R.I. 489, 177 A.2d 179, 182 (1962).

[52] 558 F.2d at 937.

[53] *Id.* at 938.

[54] *Id.*

[55] MISS. R. CIV. P. 8(a). This rule is identical to the federal rule and, therefore, it should be interpreted to require the same averments to plead the constitutionality of a statute. *See supra* note 52.

quired by notice pleading under rule 8(a), the Mississippi practitioner should plead specially the unconstitutionality of a statute so the lower court's treatment of the issue may be considered on appeal.

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CONTRACT, CORPORATION AND COMMERCIAL LAW

During 1982, the Mississippi Supreme Court decided nine commercial law cases.[1] Two of these cases involved the application of the

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[1] Only two cases were decided in the corporate law area, neither of which warrants textual discussion. Kisner v. Coffey, 418 So. 2d 58, 61-62 (Miss. 1982) (failure of corporation to re-elect shareholder to board of directors after he had withdrawn from corporation was not so oppressive to support dissolution of the corporation); Planhouse, Inc. v. Breland & Farmer Designers, Inc., 412 So. 2d 1164, 1166-67 (Miss. 1982) (failure of withdrawing corporate director to return corporate property was breach of fiduciary obligation).

Eight opinions involving contract law were rendered by the Mississippi Supreme Court. Franklin v. Lovitt Equip. Co., 420 So. 2d 1370, 1372 (Miss. 1982) (when fraud in the inducement is alleged, parol evidence of a contemporaneous oral agreement may be considered even though the written contract purports to be the full expression of the parties' agreement); Thames v. Davis & Goulet Ins., Inc., 420 So. 2d 1041, 1043-44 (Miss. 1982) (covenant not to compete is unenforceable in the absence of proof of the reasonableness of the restraint imposed); Voss v. Stewart, 420 So. 2d 761, 765 (Miss. 1982) (complainant not entitled to quantum meruit recovery when she had been compensated for her services); Sherwin-Williams Co. v. Sarrett, 419 So. 2d 1332, 1334-35 (Miss. 1982) (when all other elements of accord and satisfaction are present, certification of a check is acceptance); Bell v. Hill Bros. Constr. Co., 419 So. 2d 575, 577 (Miss. 1982) (statute of frauds inapplicable to an oral contract when party seeking enforcement was granted license to remove material from other party's land and had fully performed); Weatherford v. Martin, 418 So. 2d 777, 778 (Miss. 1982) (in the absence of fraud, mistake, or illegality, courts may not modify terms of a validly executed contract); Reynolds v. Druetta, 417 So. 2d 917, 918 (Miss. 1982) (when contract is unambiguous as written, court must give full effect to plain language of the contract); Mississippi Coast Coliseum Comm'n v. Stuart Constr. Co., 417 So. 2d 541, 543 (Miss. 1982) (whether architect's conditional acceptance of nonconforming work constituted acceptance under the contract was question for jury); Deer Creek Constr. Co. v. Peterson, 412 So. 2d 1169, 1172-73 (Miss. 1982) (when documents that constitute contract are ambiguous it is proper for court to consider parol evidence to clarify the ambiguity).

Uniform Commercial Code cases not requiring textual discussion include: First Nat'l Bank of Columbus v. Drummond, 419 So. 2d 154, 159-60 (Miss. 1982) (statute of limitations on notes does not apply to actions on contractual guarantees even after creditor forecloses on the collateral and sues on the deficiency); Johnston v. Stinson, 418 So. 2d 805, 806 (Miss. 1982) (debtor whose farm equipment was properly repossessed not entitled to actual damages); Ross Cattle Co. v. Lewis, 415 So. 2d 1029, 1034-35 (one party to contract who reasonably believes other party is unable to perform must seek assurances or tender the goods), *withdrawing* Ross Cattle Co. v. Lewis, No. 53,094, slip op. (Miss. 1982); Rand v. Moore, 414 So. 2d 885, 887 (Miss. 1982) (non-negotiable instrument is otherwise transferable by proper endorsement but there can be no holder in due course); Vinson v. McCarty, 413 So. 2d 1026, 1031 (Miss. 1982) (payment to bank by one party of balance due from another does not discharge obligation of paying party to other party on promissory note that was assigned to bank as security for the discharged obligation);

Uniform Commercial Code to the sale of a new automobile and will be treated textually.

In *Royal Lincoln-Mercury Sales, Inc. v. Wallace*,[2] the plaintiff purchased a new automobile from the defendant dealership.[3] Within two weeks the plaintiff began experiencing problems with the car.[4] Four months after the purchase, the plaintiff met with personnel from the dealership and a Ford representative to solve the recurring problems.[5] The plaintiff refused an offer from Ford to repair the car[6] but offered to trade his car for a new automobile.[7] Ford refused the offer, and the plaintiff retained possession and use of the car for several months. Later, the plaintiff parked the car permanently at the dealership and brought suit against the dealer and Ford for breach of express and implied warranties.[8] At trial, the jury awarded to the plaintiff the cost of the automobile and attorney's fees.[9] On appeal, Ford and the dealer challenged the award.[10]

The court analyzed the defendants' liability under the warranty provisions of the Mississippi Uniform Commercial Code and concluded that there was no indication that the plaintiff had relied on the seller's

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Peoples Bank & Trust Co. v. Comfort Eng'g Co., 408 So. 2d 1190, 1193 (Miss. 1982) (failure to perfect purchase money security interest precludes priority over conflicting security interest in same collateral).

[2] 415 So. 2d 1024 (Miss. 1982).

[3] *Id.* at 1025. The defendant dealership, Royal Lincoln-Mercury, also delivered to Wallace, the plaintiff, a manufacturer's new car limited warranty from Ford. *Id.*

[4] *Id.* Wallace initially complained that the chrome rattled, the engine hesitated, and the vinyl roof was peeling. The car was returned to the dealership for repairs, but Wallace contended that neither the engine nor the chrome was fixed. *Id.*

After a trip to Tennessee, Wallace returned the car to the dealership and complained that the engine leaked oil, the chrome rattled, the paint was fading, a wire protruded through the seat upholstery, and the air conditioner had failed. Although Royal Lincoln-Mercury assured Wallace that all the problems had been corrected, he continued to have trouble with the automobile. *Id.* at 1025-26.

[5] *Id.* at 1026. At the meeting Wallace stated that the engine continued to leak oil, and that neither the loose chrome nor the peeling roof had been corrected. *Id.*

[6] *Id.*

[7] *Id.* Wallace offered to trade his car plus $500 for a new automobile. When this offer was refused, Wallace offered to trade his car for a new car having an equal "sticker price." *Id.*

[8] *Id.* Wallace met with the Ford representative in November of 1978 but it was not until after March 15, 1979, that he returned the car to Royal Lincoln-Mercury. *Id.*

[9] *Id.* at 1025. The attorney's fees award arose under the Magnuson-Moss Warranty Act, which authorizes the award of attorney's fees when the breaching party has a reasonable opportunity to cure his breach. 15 U.S.C. § 2310(e) (1976). The Mississippi Uniform Commercial Code does not authorize attorney's fees under these circumstances.

[10] *Id.*

skill or judgment in selecting the automobile.[11] The court, therefore, rejected the applicability of the implied warranty of fitness for a particular purpose.[12] The court, however, found the dealer liable for breach of the implied warranty of merchantability[13] because evidence supported the jury's determination that the car was not fit for its ordinary purpose.[14]

The court held Ford liable to the plaintiff under an express warranty[15] but concluded that the remedy of revocation and return of the purchase price under breach of the implied warranty of merchantability was inapplicable to Ford.[16] Although this limitation of remedy does not appear to be inappropriate, the court's further holding that Ford cannot be held liable under breach of the implied warranty of

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[11] *Id.*

[12] *Id.* (citing Massey-Ferguson, Inc. v. Evans, 406 So. 2d 15, 17 (Miss. 1981)) (implied warranty of fitness for particular purpose breached when buyer relied on seller's expertise in selecting equipment and equipment failed). MISS. CODE ANN. § 75-2-315 (Repl. 1981) provides:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is an implied warranty that the goods shall be fit for such purpose.

[13] 415 So. 2d at 1027. MISS. CODE ANN. § 75-2-314 (Repl. 1981) states:

> (1) A warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.
>
> (2) Goods to be merchantable must be at least such as. . .
>
> (c) are fit for the ordinary purposes for which such goods are used; . . .

[14] 415 So. 2d at 1028. Royal asserted that the only remedy available to Wallace was the repair and replacement of the malfunctioning auto parts. *Id.* at 1025-26. The remedy offered by Royal, however, "failed of its essential purpose," which was to provide safe and reliable transportation for Wallace. *Id.* at 1028; *see* MISS. CODE ANN. § 75-2-719(2) (Repl. 1981), ("where circumstances cause an exclusive or limited remedy to fail of its essential purpose remedy may be had as provided in this code."). The court found that § 75-2-719(2) applied in this case and allowed Wallace to recover the purchase price less the depreciation value of the car. *Id.* at 1028. Other jurisdictions also have held repair and replacement warranties to fail of their essential purpose. *See, e.g.*, Jacobs v. Metro Chrysler-Plymouth, Inc., 125 Ga. App. 462, 188 S.E.2d 250, 253 (1972); Givan v. Mack Truck, Inc., 569 S.W.2d 243, 247 (Mo. Ct. App. 1978).

[15] 415 So. 2d at 1028. The warranty given to Wallace provided that adjustments, replacements, or repairs of any defective equipment, except tires, would be made by the dealer during the first twelve months of ownership or 12,000 miles, whichever came first. *Id.* MISS. CODE ANN. § 75-2-313 (Repl. 1981) provides:

> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

[16] 415 So. 2d at 1028.

merchantability[17] is in conflict with section 11-7-20 of the Mississippi Code.[18] The court ruled that because Ford neither sold nor contracted to sell the car to the plaintiff, an action for breach of the implied warranty of merchantability[19] was not available against Ford.[20] Because privity of contract is not essential for recovery against manufacturers in Mississippi, the court improperly held that the plaintiff could not recover from Ford under the implied warranty. The applicable statute states, "In all causes of action for personal injury or property damage or economic loss brought on account of negligence, strict liability or breach of warranty, including actions brought under the provisions of the Uniform Commercial Code, privity shall not be a requirement to maintain said action."[21]

There is an additional troublesome aspect of the court's opinion in *Royal-Lincoln Mercury*. Although Ford and the dealer were found liable under different legal theories, the return of the purchase price ordered by the court was dependent upon a finding that the acceptance of the automobile had been effectively revoked.[22] The Uniform Commercial Code provides that revocation must occur within a reasonable time after the buyer has discovered or should have discovered the defect and before any change occurs in the goods not caused by their own defects.[23] Revocation is not effective until the buyer notifies the seller of it.[24] The court noted that the plaintiff first evidenced an intention to revoke acceptance when he threatened legal action in the meeting with the Ford factory representative.[25] For revocation to be effective under the requirements of section 75-2-608(2) of the Mississippi Code,[26] it would have been necessary to revoke at that point. The plaintiff, however, continued to operate the automobile and made additional efforts to have the car repaired.[27] Although the plaintiff's subsequent use of the automobile clouded the effectiveness of revocation, the court con-

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[17] *Id.* The court relied on a Connecticut decision, Conte v. Dwan Lincoln-Mercury, Inc., 172 Conn. 112, 374 A.2d 144 (1976), and ruled that § 75-2-314 of the Mississippi Code was unavailable to the plaintiff against Ford. *Id.*

[18] MISS. CODE ANN. § 11-7-20 (Supp. 1982).

[19] *Id.* § 75-2-314 (Repl. 1981).

[20] 415 So. 2d at 1028; *see* MISS. CODE ANN. § 75-2-103(1)(d) (Repl. 1981) (defining seller as one "who sells or contracts to sell goods").

[21] MISS. CODE ANN. § 11-7-20 (Supp. 1982).

[22] 415 So. 2d at 1028-29.

[23] MISS. CODE ANN. § 75-2-608(2) (Repl. 1981).

[24] *Id.*

[25] 415 So. 2d at 1028.

[26] *See supra* text accompanying note 25.

[27] 415 So. 2d at 1026.

cluded that "[the plaintiff's] prior intention of revocation was revitalized when he returned the automobile within the 12 month and 12,000 mile warranty period and filed suit."[28]

It is uncertain whether the court's language should be interpreted to mean that the plaintiff's revocation would have been effective as long as it was made during the warranty period. This interpretation, however, appears to be inconsistent with the intent of the statute governing revocation,[29] and it is probable that the court would construe the statute more strictly under other circumstances. A buyer is given reasonable flexibility in making his revocation, especially when successive attempts to cure[30] may delay recognition that the goods are irreparable;[31] but once the buyer determines that the accepted goods are not conforming, his revocation should be promptly made.[32]

The Mississippi Supreme Court analyzed these issues again in *Volkswagen of America, Inc. v. Novak.*[33] In *Novak,* the plaintiff purchased from a Greenville dealership a new car manufactured by Volkswagen. After having problems with the car's engine, he had it serviced at the dealership. The repair work was ineffective and subsequent attempts to correct the difficulties required replacement of the engine on

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[28] *Id.* at 1028-29. Because revocation was a factual issue, the court accepted the jury's determination that it was effective. *Id.* at 1029.

[29] *See supra* note 25 and accompanying text. Factors that courts have considered in determining what constitutes revocation within a reasonable time include: (1) the difficulty of discovering the defect, (2) the terms of the contract, (3) the relative perishability of the goods, and (4) the course of performance after the sale but before rejection. WHITE & SUMMERS, UNIFORM COMMERCIAL CODE § 8-3 (2d ed. 1980).

[30] *See* MISS. CODE ANN. § 75-2-508 (Repl. 1981) (right of seller to cure improper tender or delivery).

[31] *See* Conte v. Dwan Lincoln-Mercury, Inc., 172 Conn. 112, 374 A.2d 144, 148-49 (1976) (buyer's delay in revoking acceptance was not unreasonable when seller's right to cure involved repeated attempts to correct car's defects); Overland Bond & Investment Corp. v. Howard, 9 Ill. App. 3d 348, 292 N.E.2d 168, 177 (1972) (six weeks is reasonable time to revoke acceptance when continual repairs allow buyer to possess car for seven days during seven-week period); Rose v. Epley Motor Sales, 288 N.C. 53, 215 S.E.2d 573, 576 (1975) (revocation effective one day after acceptance when car burned on day of purchase).

[32] *Cf.* Conte v. Dwan Lincoln-Mercury, Inc., 172 Conn. 112, 374 A.2d 149 (1979) (notification was within reasonable time when negotiations and continual repairs delayed revocation for 14 months).

If Wallace's revocation had been found to be ineffective, his remedy would have been under MISS. CODE ANN. § 75-2-714(2) (Repl. 1981), which provides that a buyer's damages for breach of warranty with respect to accepted goods is the "difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted."

[33] 418 So. 2d 801 (1982).

three different occasions.[34] The plaintiff notified the president of Volkswagen that unless the engine was properly replaced or a new automobile substituted by a certain date, he would revoke acceptance of the automobile. After the deadline passed without satisfaction, the plaintiff parked the car at the dealership and brought suit against the original dealer, its successor,[35] and Volkswagen.[36] The prior and present dealers were granted a directed verdict, and the case proceeded against Volkswagen on the issues of rescission and breach of warranty. The jury found in favor of the plaintiff,[37] and Volkswagen appealed, contending that the remedy of revocation of acceptance and return of the purchase price was not appropriate because Volkswagen was not a "seller" as defined by the Uniform Commercial Code.[38]

In rejecting Volkswagen's argument, the court properly relied on section 11-7-20 of the Mississippi Code, which as mentioned earlier, abolished the privity requirement in a suit for breach of implied warranty against a manufacturer.[39] The *Novak* court concluded that the statutory abolition of privity applied to a suit seeking the revocation and return of the purchase price,[40] and, therefore, Volkswagen was liable to the plaintiff for its breach of the implied warranty of merchantability, regardless of privity.[41]

Because the decision in *Royal Lincoln-Mercury* regarding Ford's liability is inappropriate, the court corrected itself and reached a better conclusion in *Novak* by holding the manufacturer liable for breach of the implied warranty. In light of the *Novak* decision, revocation and return of purchase price is a remedy clearly available in an action for breach of implied warranty regardless of privity,[42] despite the contrary

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[34] *Id.* at 802-03.

[35] *Id.* at 803. During the time Novak had possession of the automobile, MAC Sales, Inc., purchased the assets of John Hinkle, Inc., the dealer from whom Novak had originally bought the automobile. *Id.*

[36] *Id.* Novak sued to revoke acceptance because the defects in the automobile substantially impaired its value. *Id.*

[37] *Id.* The jury's verdict of $19,398.18 included the purchase price, attorney's fees, and incidental and consequential damages. *Id.*

[38] *Id.* at 802-04; *see supra* note 22 and accompanying text.

[39] *See supra* note 18 and accompanying text.

[40] 418 So. 2d at 804. The Uniform Commercial Code specifically authorizes suits for revocation of acceptance under MISS. CODE ANN. § 75-2-608 (Repl. 1981). Therefore, *id.* § 11-7-20 (Supp. 1982), which abolishes any privity requirement in suits brought under the Uniform Commercial Code, is applicable to Novak's suit. 418 So. 2d at 803.

[41] 418 So. 2d at 803-04.

[42] *See supra* notes 40-41 and accompanying text.

indication from *Royal Lincoln-Mercury*.[43] Section 11-7-20 of the Mississippi Code clearly abolished the privity requirement in warranty suits under the Uniform Commercial Code,[44] and the court correctly held in *Novak* that this statutory abolition of the privity requirement allows the buyer to recover directly from the manufacturer for breach of the implied warranty of merchantability.[45]

Bruce M. Kuehnle, Jr.

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[43] *See supra* notes 15-20 and accompanying text.
[44] *See supra* note 18 and accompanying text.
[45] *See supra* notes 40-41 and accompanying text.

CRIMINAL LAW AND PROCEDURE

In 1982, the Mississippi Supreme Court dealt with several significant issues in the area of criminal law and procedure, including the force element of rape, the right to hold public office after conviction, presentence credit for time served in another jurisdiction, and amendments to the Uniform Criminal Rules of Circuit Court Practice.[1]

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[1] Decisions handed down in 1982 that are not treated textually are: Copeland v. State, 423 So. 2d 1333, 1337 (Miss. 1982) (indictment void by reason of failure to charge a crime; in certain circumstances state must disclose the identity and location of confidential informant but the duty does not require state to guarantee informant's presence at trial); Ashley v. State, 423 So. 2d 1311, 1314 (Miss. 1982) (admission of blood test results no violation of fourth amendment when officer had probable cause to arrest); Shearer v. State, 423 So. 2d 824, 826 (Miss. 1982) (judge's decision to admit evidence will not be reversed absent abuse of discretion sufficient to prejudice accused); Jackson v. State, 423 So. 2d 129, 131 (Miss. 1982) (allowing district attorney to read before jury the out-of-court statement of victim/prosecuting witness was not reversible error); Crawley v. State, 423 So. 2d 128, 129 (Miss. 1982) (habitual criminal statute, MISS. CODE ANN. § 99-19-83 (Supp. 1982), does not require that third felony offense be committed after conviction for two previous felony offenses); Neal v. State, 422 So. 2d 747, 748 (Miss. 1982) (equal protection clause does not require appointment of counsel for indigent defendant in any discretionary or collateral proceeding); Evans v. State, 422 So. 2d 737, 747 (Miss. 1982) (upholding death sentence in capital murder case); Daniels v. State, 422 So. 2d 289, 292 (Miss. 1982) (prosecution failed to rebut defense of entrapment; failure to require prosecution to identify confidential informant was error); Laney v. State, 421 So. 2d 1216, 1218, 1219 (Miss. 1982) (juror's failure to properly answer voir doir inquiry deemed prejudicial; M'Naghten test of insanity adhered to); King v. State, 421 So. 2d 1009, 1015 (Miss. 1982) (separation of one juror from jury panel for voir dire examination not error when juror not exposed to outside influence); Phillips v. State, 421 So. 2d 476, 481 (Miss. 1982) (for purposes of habitual offender statute, MISS. CODE ANN. § 99-19-81 (Supp. 1982), a defendant may not attack constitutionality of prior conviction at sentencing hearing when record shows voluntary guilty plea was made); Hall v. State, 420 So. 2d 1381, 1385 (Miss. 1982) (jury instructions submitting issue of self-defense to jurors in prosecution for aggravated assault proper); Crossley v. State, 420 So. 2d 1376, 1380 (Miss. 1982) (defendant not prejudiced by arraignment in vacation); Hughes v. State, 420 So. 2d 1060, 1062 (Miss. 1982) (detailed and fair self-defense jury instructions given by circuit judge in prosecution for aggravated assault held proper); Young v. State, 420 So. 2d 1055, 1058 (Miss. 1982) (district attorney's comment not error if doubtful that jury would understand it to refer to defendant's failure to testify); Bayse v. State, 420 So. 2d 1050, 1054 (Miss. 1982) (admission of out-of-court statements made by defendant's spouse constituted error); Jackson v. State, 420 So. 2d 1045, 1046-47 (Miss. 1982) (indictment containing statutory language sufficient if offense fully defined in statute); Williams v. State, 420 So. 2d 562, 563 (Miss. 1982) (defendant escaping from custody after conviction but prior to sentencing should be tried for escape under MISS. CODE ANN. § 97-9-51 (Supp. 1982)); Hurt v. State, 420 So. 2d 560, 561 (Miss. 1982) (habitual

I. RAPE

One of the Mississippi Supreme Court's more controversial deci-

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criminal defendant not entitled to jury trial during sentencing phase); Wheat v. State, 420 So. 2d 229, 237-38 (Miss. 1982) (court did not err by failing to require defendant to undergo mental examination); Eubanks v. State, 419 So. 2d 1330, 1331-32 (Miss. 1982) (admission of evidence of crime separate and distinct from crime alleged in indictment held prejudicial error); Pate v. State, 419 So. 2d 1324, 1325 (Miss. 1982) (defendant not surprised or disadvantaged by testimony that conflicted with crime lab report); Roby v. State, 419 So. 2d 1036, 1038 (Miss. 1982) (warrantless search of vehicle valid under United States v. Ross, 102 S.Ct. 2157 (1982)); Flemmons v. State, 419 So. 2d 1034, 1036 (Miss. 1982) (circumstantial evidence jury instruction not required unless state's case relies completely on circumstantial evidence); *In re* J.E.J., 419 So. 2d 1032, 1034 (Miss. 1982) (hearing for adjudication of delinquency by Youth Court under MISS. CODE ANN. § 43-21-601 (1972) must be separate and distinct from the disposition hearing); Smith v. State, 419 So. 2d 563, 568 (Miss. 1982) (capital murder conviction upheld; failure of legislature to provide for sentence of imprisonment without parole does not violate equal protection); Sessums v. State, 419 So. 2d 189, 190 (Miss. 1982) (conviction for livestock larceny cannot be upheld without evidence that cow was alive when stolen); Callahan v. State, 419 So. 2d 165, 175 (Miss. 1982) (jury decision whether mayor and police were acting in scope of duty not to be overruled by appellate court); Jones v. State, 418 So. 2d 832, 833 (Miss. 1982) (failure to instruct jury that apparent danger will justify self-defense is not reversible error); Jackson v. State, 418 So. 2d 827, 830-32 (Miss. 1982) (felony convictions on appeal considered during sentencing under habitual criminal statute); Black v. State, 418 So. 2d 819, 823 (Miss. 1982) (warrantless inventory search of defendant's impounded car was authorized); Ethridge v. State, 418 So. 2d 798, 800-01 (Miss. 1982) (admission of defendant's gun, which was same size as murder weapon, and blood-stained clothing was proper in murder trial); Robinson v. State, 418 So. 2d 794, 797 (Miss. 1982) (when jury unable to reach decision, trial court can provide further instructions); Robinson v. State, 418 So. 2d 749, 751-52 (Miss. 1982) (inventory search of automobile does not violate fourth amendment); Holliday v. State, 418 So. 2d 69, 73 (Miss. 1982) (defendant's conviction for manslaughter affirmed); Otis v. State, 418 So. 2d 65, 67 (Miss. 1982) (double jeopardy and collateral estoppel not applicable to separate and distinct offenses); Hines v. State, 417 So. 2d 924, 925 (Miss. 1982) (upheld judge's decision not to remove sleeping juror); Harrington v. City of Columbus, 417 So. 2d 555, 556 (Miss. 1982) (question whether verdict was against overwhelming weight of evidence not before court when appellant failed to move for new trial); McKlemurry v. State, 417 So. 2d 554, 555 (Miss. 1982) ("putting" partial bridge in patient's mouth does not constitute unlawful practice of dentistry); Epps v. State, 417 So. 2d 543, 545 (Miss. 1982) (prosecution bears burden of rebutting uncontradicted evidence of entrapment); Briggins v. State, 416 So. 2d 691, 692 (Miss. 1982) (trial court correctly refused jury instructions that constituted comment on evidence); Johnson v. State, 416 So. 2d 679, 681-82 (Miss. 1982) (failure to preserve error in admission of contested evidence bars raising issue on appeal); Gentry v. State, 416 So. 2d 650, 652-53 (Miss. 1982) (allowed use of robbery confession to prove capital murder); Johnson v. State, 416 So. 2d 383, 386-87 (Miss. 1982) (allowed evidence of burglary, attempted rape, and shooting to infer identity of defendant, motive and res gestae in capital murder conviction); Martin v. State, 415 So. 2d 706, 709 (Miss. 1982) (instructing jury to consider mercy in its verdict constitutes error); State v. Parks, 415 So. 2d 704, 705-06 (Miss. 1982) (state not authorized to make interlocutory appeals

regarding suppression of evidence); Turner v. State, 415 So. 2d 689, 691 (Miss. 1982) (motions for severance must be timely made); Valentine v. State, 415 So. 2d 687, 689 (Miss. 1982) (sentencing is within judge's discretion to extent sentence does not exceed statutory limits); Eastwood v. State, 415 So. 2d 678, 679 (Miss. 1982) (applied common law definition of "night" to statute under which "night" was an essential element); Kelly v. State, 414 So. 2d 446, 448 (Miss. 1982) (explanation that vital witness is on vacation not sufficient reason for absence); Lewis v. State, 414 So. 2d 435, 436-37 (Miss. 1982) (circuit judge lacked authority to transfer prisoner from one institution within Department of Corrections to another); York v. State, 413 So. 2d 1372, 1374 (Miss. 1982) (lineup identification of defendant not impermissibly suggestive and did not violate due process); Hyde v. State, 413 So. 2d 1042, 1044 (Miss. 1982) (no prejudice when defendent required to exhibit his teeth to jury); Miller v. State, 413 So. 2d 1041, 1042 (Miss. 1982) (seller's agreement to hold check for three days until buyer returned with cash indicated lack of belief that check was good); Patterson v. State, 413 So. 2d 1036, 1039 (Miss. 1982) (defendant's confessions sufficiently removed from illegal search to be free from taint of illegality); Goss v. State, 413 So. 2d 1033, 1034-35 (Miss. 1982) (uncorroborated testimony of prosecutrix in rape case should be closely examined and scrutinized); Harris v. State, 413 So. 2d 1016, 1019 (Miss. 1982) (admission of photograph of murder scene not reversible error); Wall v. State, 413 So. 2d 1014, 1015-16 (Miss. 1982) (photograph of murder defendant pointing to location of empty shell casing held admissible); Riddle v. State, 413 So. 2d 737, 738 (Miss. 1982) (habitual offender statute inappropriately applied when state failed to demonstrate defendant had been previously convicted of two separate felonies); Fuson v. State, 413 So. 2d 734, 737 (Miss. 1982) (statements made by victim constituted dying declaration even though victim survived five days after being attacked); Martin v. State, 413 So. 2d 730, 733-34 (Miss. 1982) (evidence of firearms admissible as tools of the trade in contraband prosecution, even though accused not charged with firearms violation); Anderson v. State, 413 So. 2d 725, 729 (Miss. 1982) (post-arrest, post-charge lineup identification without counsel not unconstitutional when protection intelligently waived); Lumpkin v. State, 413 So. 2d 386, 388-89 (Miss. 1982) (use of additional instructions cured defects of flawed instruction); Emanuel v. State, 412 So. 2d 1187, 1188-89 (Miss. 1982) (trial court's denial of jury trial to determine competency of defendant to stand trial upheld); Culberson v. State, 412 So. 2d 1184, 1186-87 (Miss. 1982) (neither court nor counsel may deny accused the right to testify); Birchfield v. State, 412 So. 2d 1181, 1183 (Miss. 1982) (upheld warrant for blood-semen test issued by municipal court judge); Green v. State, 412 So. 2d 758, 761 (Miss. 1982) (voluntary waiver of *Miranda* rights need not be in writing for admissability of inculpatory statements); Sparks v. State, 412 So. 2d 754, 757 (Miss. 1982) (best evidence rule applies only to documentary evidence); Scruggs v. State, 412 So. 2d 732, 738 (Miss. 1982) (applied totality-of-circumstances approach to juvenile waiver of rights situation); Bourdeaux v. State, 412 So. 2d 241, 243 (Miss. 1982) (when criminal offense falls within either of two statutes, statute imposing lesser punishment must be applied); Arrington v. State, 411 So. 2d 779, 780 (Miss. 1982) (defendant's testimony at previous trial held admissible in later trial as part of state's case); Howell v. State, 411 So. 2d 772, 777 (Miss. 1982) (reversible error for court to allow district attorney to instruct jury that their decision would not be final); Bell v. State, 411 So. 2d 763, 765 (Miss. 1982) (trial judge's failure to submit additional instructions not error when appellant did not request instruction); Moss v. State, 411 So. 2d 90, 94-95 (Miss. 1982) (upheld warrantless and nonconsentual entry of dwelling based on exigent circumstances); Adams v. State, 410 So. 2d 1332, 1334 (Miss. 1982) (Mississippi habitual offender statute not cruel and inhu-

sions in 1982 was *McQueen v. State*,[2] which resulted in McQueen's conviction for the forcible rape of the fourteen year-old prosecutrix.[3]

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man treatment); Ware v. State, 410 So. 2d 1330, 1331-32 (Miss. 1982) (passenger in car of another had no standing to contend fourth amendment violation by seizure of incriminating evidence found in car); McLamb v. State, 410 So. 2d 1318, 1319 (Miss. 1982) (in-court identification admissible under totality of circumstances); Cutrer v. State, 410 So. 2d 1308, 1309-10 (Miss. 1982) (contraband found on premises that are in complete control of defendant creates rebuttable presumption that contraband belongs to defendant); Lovelace v. State, 410 So. 2d 876, 878-79 (Miss. 1982) (when witness fails to deny previous conviction during impeachment, but asserts inability to recall conviction, evidence of prior conviction may be admitted pursuant to MISS. CODE ANN. § 13-1-13 (1972)); Knowles v. State, 410 So. 2d 380, 381-82 (Miss. 1982) (larceny conviction reversed because trial judge failed to give instruction on lesser-included offense); Hickombottom v. State, 409 So. 2d 1337, 1338-39 (Miss. 1982) (court must look to totality of circumstances to find victim's identification of defendant is free of taint); Williams v. State, 409 So. 2d 1331, 1333 (Miss. 1982) (exclusion of public from probation revocation hearing does not violate sixth amendment); Clark v. State, 409 So. 2d 1325, 1327-28 (Miss. 1982) (reversible error for trial judge to admit foreign language documents into evidence without translation and determination of materiality and competency); Drungo v. State, 409 So. 2d 1323, 1325 (Miss. 1982) (trial court properly refused appellant's self-defense jury instruction when another instruction on self-defense had been given); Robinson v. State, 409 So. 2d 719, 720 (Miss. 1982) (lower court did not err in denying petition for writ of error coram nobis because relief could not have been granted even if petition had been properly drafted); Collins v. State, 408 So. 2d 1376, 1380 (Miss. 1982) (prosecutor's statements to jury constituted reversible error); King v. State, 408 So. 2d 1375, 1376 (Miss. 1982) (photograph of deceased had evidentiary value); Horton v. State, 408 So. 2d 1197, 1199 (Miss. 1982) (troy ounce to be used in measuring illegal substances); McFadden v. State, 408 So. 2d 476, 481 (Miss. 1982) (words "unlawfully" and "feloniously" are sufficient to make necessary charge of "intent" to steal); Wilks v. State, 408 So. 2d 68, 70 (Miss. 1982) (district attorney's comments to jury not reversible error).

[2] 423 So. 2d 800 (Miss. 1982) (on rehearing).

[3] *Id.* McQueen was convicted of violating MISS. CODE ANN. § 97-3-65(2) (Supp. 1982), which provides:

> Every person who shall forcibly ravish any female of the age of twelve (12) years or upward, or who shall have been convicted of having carnal knowledge of any female above the age of twelve (12) years without her consent, by administering to her any substance of liquid which shall produce such stupor or such imbecility of mind or weakness of body as to prevent effectual resistence, upon conviction shall be imprisoned for life in the state penitentiary if the jury by its verdict so prescribes; and in cases where the jury fails to fix the penalty at life imprisonment the court shall fix the penalty at imprisonment in the state penitentiary for any term as the court, in its discretion, may determine.

According to the testimony of the prosecutrix, McQueen drove the victim to a secluded area, ordered her to remove her clothing, and forced her to have sexual intercourse. Although he used a "heavy" tone when talking, he neither threatened her nor applied physical force. The prosecutrix testified that she feared the defendant because he was twice her age, he had been drinking, and they were in a secluded area. *McQueen*, 423 So. 2d at 801.

On appeal, the supreme court reversed the trial court and discharged McQueen,[4] holding the prosecution's evidence legally insufficient to support a forcible rape conviction.[5]

Although the common law definition of rape is the unlawful carnal knowledge of a woman by force and without her consent,[6] the Mississippi Supreme Court has recognized a distinction between statutory rape, which is sexual intercourse with a female who is deemed incapable of consenting due to tender years or mental incapacity,[7] and forcible rape, which is the forcible ravishment of a female without her consent.[8] In Mississippi, extensive case law has developed the meaning and parameters of the force element of rape. In *Milton v. State*,[9] an early case discussing the nexus between the rapist's force and the victim's resistance, the court recognized the "well-settled" rule that if the female fails to resist, she is deemed to have passively consented, and therefore, has not been forcibly raped.[10] The *Milton* court also ruled that an attack is considered forcible rape when the victim's failure to resist results from a state of fear created by the assailant.[11]

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[4] *Id.* at 804. The court, upon finding the evidence legally insufficient to support conviction, discharged the defendant because the double jeopardy clause of the fifth amendment to the United States Constitution bars a retrial of convictions reversed because of insufficient evidence. *Id.* at 803 (citing Greene v. Massey, 437 U.S. 19, 24 (1978); Burks v. State, 437 U.S. 1, 18 (1978)). Unfortunately, the majority failed to discuss whether the state was precluded from indicting the defendant for statutory rape pursuant to MISS. CODE ANN. § 97-3-65(1) (Supp. 1982). In dissent, Justice Dan Lee stated that despite the reversal, the case could be presented to a grand jury on a charge of statutory rape. 423 So. 2d at 805 (D. Lee, J., concurring in part and dissenting in part).

[5] 423 So. 2d at 803.

[6] Wilson v. State, 221 So. 2d 100, 103 (Miss. 1969); *see* CLARK & MARSHALL, A TREATISE ON THE LAW OF CRIMES § 11.01, at 752-53 (7th ed. 1967). Rape, although frequently described by different terminology, is recognized as a crime in every jurisdiction. 3 C. TORCIA, WHARTON'S CRIMINAL LAW § 283, at 1-3 (14th ed. 1980); *see, e.g.*, MISS. CODE ANN. § 97-3-65 (Supp. 1982) (encompassing the crimes of statutory and forcible rape).

[7] *See* Lee v. State, 322 So. 2d 751, 752 (Miss. 1975). The central element of rape is that sexual intercourse must be accomplished without the female's consent. 3 C. TORCIA, *supra* note 6, § 287, at 30. In forcible rape, the requisite lack of consent results from the defendant's actual or threatened use of force. *Id.* § 287, at 32. Stated conversely, and perhaps more clearly, when a defendant uses force or threatens force to procure sexual intercourse, there can be no consent by the victim. *Id.* § 288, at 32. *See generally* Wilson v. State, 221 So. 2d 100, 103 (Miss. 1969) (discussing force as essential element of rape when female physically and mentally capable of resistance).

[8] Lee v. State, 322 So. 2d 751, 752 (Miss. 1975).

[9] 142 Miss. 364, 107 So. 423 (1926). The defendant, wielding a revolver, attacked the 16-year-old victim in secluded woods. *Id.* at 368, 107 So. at 423.

[10] *Id.*, 107 So. at 423.

[11] *Id.*, 107 So. at 423; *see* Johnson v. State, 223 Miss. 56, 63, 76 So. 2d 841, 842

The issue of whether the presence of a weapon was required to create a reasonable apprehension of fear in the victim was settled in *Rush v. State*,[12] in which the assailant neither verbally threatened nor exhibited a weapon but did physically assault and injure the victim.[13] Generally addressing the issue of force, the *Rush* court reaffirmed its holding in *Milton*.[14] The court held that despite the absence of a weapon, the victim did not consent because she reasonably believed she was in danger of great bodily harm if she physically resisted.[15]

In *McQueen*,[16] the court cited *Rush v. State*[17] with approval, but factually distinguished the two cases. The *McQueen* court ruled that the state's evidence of forcible rape was legally insufficient.[18] To emphasize its dissatisfaction with the state's case, the court noted "the evidence for the state not only fails to satisfy the mind of the guilt of the accused but suggests grave doubt of it."[19]

Justice Broom registered a vigorous dissent.[20] Relying on *Rush v. State*,[21] Justice Broom stated that the evidence of force was not legally insufficient in the *McQueen* case.[22] He concluded that the court

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(1955); McGee v. State, 40 So. 2d 160, 171 (1949). In some earlier cases, the victim was required to resist to the utmost to sustain a conviction of forcible rape. *See, e.g.*, Perez v. State, 50 Tex. Crim. 34, 94 S.W. 1036, 1038 (1906). *Milton* demonstrates that this standard of resistance is no longer applied in Mississippi. 3 C. TORCIA, *supra* note 6, § 288, at 35.

[12] 301 So. 2d 297 (Miss. 1974).

[13] *Id.* at 299.

[14] *Id.*

[15] *Id.* The general rule in most jurisdictions is that a victim must resist to the extent necessary to manifest non-consent. 3 C. TORCIA, *supra* note 6, § 288, at 35-36. The degree of force required is determined by the circumstances. If resistance would be futile, it is not necessary. *Id.* § 288, at 36-37; *see, e.g.*, People v. Faulisi, 25 Ill. 2d 457, 185 N.E.2d 211, 213 (1962) (resistance futile if victim is overcome by superior force or if life is endangered); Barnett v. Commonwealth, 216 Va. 200, 217 S.E.2d 828, 830 (1975) (same).

[16] 423 So. 2d 800 (Miss. 1982).

[17] 301 So. 2d 297 (Miss. 1974); *see supra* notes 12-15 and accompanying text.

[18] 423 So. 2d at 803.

[19] *Id.* In support of its determination the court enumerated several factors. First, the medical evidence regarding penetration was questionable. *Id.* at 802. Second, the victim suffered no bruises or marks of violence, other than a reddened vulva. *Id.* at 803. Finally, the evidence failed to show the victim submitted because of a reasonable apprehension of harm, because no weapon was exhibited and the defendant did not overtly threaten the victim. *Id.*

[20] Justice Dan Lee and Justice Hawkins also filed separate dissents.

[21] 301 So. 2d 297 (Miss. 1974). *See supra* notes 12-15 and accompanying text.

[22] *McQueen*, 423 So. 2d at 805. Justice Broom, summarizing the victim's testimony, emphasized that the victim was half the defendant's age and that the defendant had taken the victim to a remote area. *Id.* at 806. Based upon these facts, Justice Broom

"should not require the victim of forcible rape to do more than her age, strength, surrounding facts and all attending circumstances made it reasonable for her to do in order to manifest"[23] non-consent to the defendant's actions.

Public concern has followed in the wake of the *McQueen* decision.[24] Adverse reactions have emanated from the fear that this decision holds, in effect, that a rape victim must offer the utmost physical resistance before a charge of forcible rape will lie.[25] Whether this perception is the actual holding in *McQueen* is debatable. Significantly, the court did not expressly retreat from its general rule regarding force as developed in prior opinions.[26] But the court's utilization of loosely drawn language to distinguish the facts in *McQueen* from prior rape cases is likely to create confusion. This weakness in the opinion has given rise to the fear that the court has impliedly retreated from its earlier decisions dealing with force. In subsequent cases, *McQueen* should be limited to its facts and should not be viewed as precedent for a departure from the court's traditionally commendable protection of rape victims.

II. No Right to Hold Public Office After Conviction

The Mississippi Supreme Court clarified a significant issue of appellate criminal procedure in *Cumbest v. State*.[27] The court defined the relationship between election laws and criminal procedure, and overruled a number of earlier cases.[28]

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determined that a jury reasonably could conclude that the victim was placed in reasonable fear of bodily harm and therefore did not consent to the intercourse. *Id.*

[23] *Id.* at 806.

[24] *See, e.g.*, Fields, *Rape Victims Must Now Fight to Their End*, Oxford Eagle, Oct. 5, 1982, at 4, col. 1 (expressing concern over *McQueen*'s ramifications).

[25] Justice Broom captured the acrimony of such a ruling by stating that "too many times where a rape victim kicked, screamed, and physically fought to the bitter end she became victim of a homicide following a rape." *McQueen*, 423 So. 2d at 806.

[26] *See supra* notes 9-15 and accompanying text.

[27] 416 So. 2d 683 (Miss. 1982).

[28] *See* Wilkinson County Bd. of Supervisors v. Jolliff, 230 So. 2d 61, 62 (Miss. 1969) (defendant reinstated in office of county supervisor after reversal of conviction; recovery of salary allowed with interest which accrued during period of removal); Jolliff v. Wilkinson County Bd. of Election Comm'rs, 215 So. 2d 240, 240 (Miss. 1968) (defendant's appeal seeking right to run in special election held moot when conviction reversed and defendant restored to former office); Jolliff v. State, 215 So. 2d 234, 239 (Miss. 1968) (conviction reversed, removal from office reversed, and defendant reinstated in office); Jolliff v. State, 210 So. 2d 47, 48 (Miss. 1968) (injunction prohibited holding of special election to fill vacancy in office pending appeal of supervisor after removal from office).

While serving as supervisor of district one in Jackson County, [29] the defendant was indicted, tried, and convicted for fraud in public office.[30] Following his conviction, the defendant was removed from public office[31] and sentenced.[32] While the defendant's appeal to the Mississippi Supreme Court was pending,[33] the Jackson County Board of Supervisors entered an order declaring a vacancy in the district one supervisor's office[34] and directed the election commissioners to fill the vacancy by holding a special election.[35] The defendant petitioned the Mississippi Supreme Court to advance his appeal on the docket and to issue a temporary injunction prohibiting any election for the remainder of his term pending the appeal of his case.[36]

The Mississippi Constitution authorizes removal of public officials from office "for wilful neglect of duty or misdemeanor in office."[37] This constitutional provision is supplemented by section 25-5-1 of the Mississippi Code, which provides for the removal of any public official who is convicted of, among other things, a felony, a violation of the Internal Revenue Code, or corruption in office.[38]

In 1966, the Mississippi Supreme Court, in *Bucklew v. State*,[39] relied on these constitutional and statutory provisions and refused to

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[29] 416 So. 2d at 684.

[30] *Id.*

[31] *Id.* Following the conviction, the Honorable Arthur B. Clark, acting as special circuit court judge, rendered judgment on November 6, 1981, removing the defendant from public office. *Id.*

[32] The circuit court sentenced the defendant to serve four years in the Mississippi Department of Corrections, with three years suspended. *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.* The board also appointed Gavin F. Hamilton to fill the vacancy until a successor was elected in the special election. *Id.*

[36] *Id.*

[37] MISS. CONST. art. VI, § 175 states in full: "All public officers, for willful neglect of duty or misdemeanor in office, shall be liable to presentment or indictment by a grand jury; and, upon conviction, shall be removed from office, and otherwise punished as may be prescribed by law."

[38] MISS. CODE ANN. § 25-5-1 (Supp. 1982) provides in pertinent part:

> If any public officer, state, district, county or municipal, shall be convicted in any court of this state or any other state or in any federal court of any felony other than manslaughter or any violation of the United States Internal Revenue Code, of corruption in office or peculation therein, or of gambling or dealing in futures with money coming to his hands by virtue of his office, any court of this state, in addition to such other punishment as may be prescribed, shall adjudge the defendant removed from office; and the office of the defendant shall thereby become vacant.

[39] 192 So. 2d 275 (Miss. 1966).

stay a public official's removal from office pending appeal. The court held that section 175 of the state constitution and section 25-5-1 of the Mississippi Code were self-executing and did not contain provisions for suspension of removal pending appeal.[40] The court reasoned that "[it] would be against the public interest to retain in office, pending an appeal, one who, upon a verdict of guilty and judgment by the court, is no longer presumed to be innocent."[41] The *Bucklew* case, however, was significantly limited by the decision of *Jolliff v. State*,[42] in which the court refused to stay a public official's removal from office pending appeal but did stay a special election pending appeal.[43]

Jolliff was convicted of interfering with an officer in the discharge of his duties,[44] and was removed from office. Jolliff perfected an appeal from his conviction to the Mississippi Supreme Court.[45] While Jolliff's appeal was pending, the board of supervisors ordered a special election.[46] Jolliff submitted a nominating petition to the election commission to place his name on the ballot in the special election. The commission refused to accept the petition and Jolliff appealed again to the supreme court.[47] Jolliff then filed a motion to advance the appeals, to vacate his removal from office, and to stay the election pending the decision on his appeals.[48]

The court reviewed the constitutional and statutory mandates concerning public office holders convicted of crimes[49] and refused to stay Jolliff's removal from office pending his appeals. The court did, however, stay the special election pending the outcome of his appeals. Thus, Jolliff remained in office to avoid frustrating the court's appellate jurisdiction until it had time to consider the issues raised on appeal.[50] In the *Cumbest* decision, the court held "the *Jolliff* cases must

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[40] *Id.* at 276.

[41] *Id.* Ironically, when Bucklew's criminal appeal was heard, his conviction was reversed. Bucklew v. State, 206 So. 2d 200, 204 (Miss. 1968).

[42] 210 So. 2d 47 (Miss. 1968).

[43] *Id.* at 48.

[44] The incident occurred on September 5, 1967, prior to Jolliff's election to office. 215 So. 2d at 235. Jolliff was elected as supervisor of district one in Wilkinson County in November, 1967 and took office in January, 1968. In March, 1968 he was tried and convicted of a felony under the provisions of MISS. CODE ANN. § 97-9-55 (1972). 210 So. 2d at 47.

[45] 210 So. 2d at 48.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *See supra* notes 38-39.

[50] 210 So. 2d at 48. The court stayed the election only until it could have the time to

be overruled on the principle of law that a person removed from office under section 175 of [the Mississippi] Constitution and Miss. Code Ann. § 25-5-1 (Supp. 1981) has no right whatsoever to such office by virtue of his election thereto."[51] The court also concluded that the reasoning of *Bucklew* had been ignored in the *Jolliff* cases, and neither the constitution nor the statute made any provision for restoration to office.[52]

The court recognized two separate interests that must be considered in cases similar to *Cumbest*: the interests of the official and the interests of the people served by the office.[53] An elected official has a valuable right and a material interest in his office[54] but the state's citizens have an overriding right to be represented by an official "in whom they can repose confidence, unstained by any convictions."[55] In summary, the court recognized that a public office belongs to the people it serves, and the rights of the people are therefore paramount to those of the office holder.[56]

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determine the issues raised in Jolliff's appeals. Among those issues was whether Jolliff should be allowed to place his name on the ballot for the special election. The court correctly reasoned that were it to allow the election to go forward before it could reach a decision, the court's jurisdiction would be frustrated because of the moot issue. *Id.* The court did not decide whether all future special elections should be stayed pending the appeal of a public officer.

[51] 416 So. 2d at 687.

[52] *Id.* at 688. The court also noted that even if it were to accept the rationale of the *Jolliff* cases, Cumbest had no standing to interfere in the election because he had not sought to have his name placed on the ballot. *Id.* at 686-87.

[53] *Id.* at 688.

[54] *Id.* The court also recognized that Cumbest may have gained his office at great sacrifice of time and money, that he might have served honorably for many years, and that his conviction might be completely overturned on appeal. *Id.*

[55] *Id.*

[56] *Id.* at 689. "It is in this manner only that quiet, harmonious and orderly government can be insured. Any other course results in a hovering cloud of uncertainity on the processes of government." *Id.*

It is generally agreed that a person who has been convicted of a crime is not entitled to hold office pending his appeal. *See, e.g.*, Keenan v. McGuane, 13 Ill. 2d 520, 150 N.E.2d 168, 177-78 (trust placed in public official requires him to vacate office following conviction of infamous crime), *cert. denied*, 358 U.S. 828 (1958); Anderson v. Fousek, 91 Mont. 448, 8 P.2d 791, 794 (1932) (office of mayor became vacant by force of statute upon felony conviction); Guthrie v. Chapman, 187 Wash. 327, 60 P.2d 245, 247 (1936) (county commissioner lost right and title to office when convicted of felony). *See generally* 63 AM. JUR. 2d *Public Officers and Employers* § 196 (1972) (although person who has been convicted may ultimately establish innocence, he is not necessarily entitled to hold office in the meantime). *But see* Board of County Comm'rs v. Litton, 315 P.2d 239, 242 (Okla. 1957) (public official does not forfeit office pending appeal because conviction not final until final determination on appeal).

III. Presentence Credit

Sentencing credit for time spent in confinement prior to trial was the subject of one statute construed by the Mississippi Supreme Court in 1982. In *Holland v. State*,[57] the defendant made a post-conviction motion pursuant to section 99-19-23 of the Mississippi Code[58] to correct a sentence by allowing credit for 614 days spent in a county jail in Indiana prior to his extradition to Mississippi.[59] During that 614-day period, the defendant was unable to post $50,000 bail and contested extradition to Mississippi on a kidnapping charge.[60] The trial court denied the defendant's motion.[61]

On appeal,[62] the Mississippi Supreme Court affirmed the trial court's denial of the motion,[63] holding that section 99-19-23[64] had no application to time served in another state by an accused person who was awaiting return to Mississippi to face criminal charges.[65]

It is unfortunate that the Mississippi Supreme Court accorded little analysis[66] to this decision, which involved extremely important legal issues. Although it is difficult to discern "general rules" from the available literature, it is possible to recognize two distinct issues concerning sentence credit for pre-trial incarceration.

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[57] 418 So. 2d 73 (Miss. 1982).

[58] *Id.* at 74. Miss. Code Ann. § 99-19-23 (1972) provides:

> The number of days spent by a prisoner in incarceration in any municipal or county jail while awaiting trial on a criminal charge, or awaiting an appeal to a higher court upon conviction, shall be applied on any sentence rendered by a court of law or on any sentence finally set after all avenues of appeal are exhausted.

[59] 418 So. 2d at 74.

[60] *Id.*

[61] *Id.*

[62] The question presented on appeal was whether time served in another state while awaiting extradition to Mississippi constituted credit for time covered by Miss. Code Ann. § 99-19-23 (1972). 418 So. 2d at 74; *see supra* note 58.

[63] 418 So. 2d at 74.

[64] Miss. Code Ann. § 99-19-23 (1972); *see supra* note 58.

[65] 418 So. 2d at 74. A contrary result "would encourage an accused to flee this State and seek refuge in a state or locality of his own choosing, and fight extradition knowing that any time spent in jail in such state would be credited to any sentence received by him upon conviction." *Id.*

The Mississippi Supreme Court has had few opportunities to interpret the meaning of Miss. Code Ann. § 99-19-23 (1972). The only other published decision found that interpreted this statute was Mansell v. State, 403 So. 2d 871 (1981), in which a defendant was entitled to credit for time served in the Madison County, Mississippi, jail while he was awaiting trial. *Id.* at 874-75.

[66] The slip opinion is less than one legal page in length.

The first issue, which appears in *Holland* and is relatively well settled, concerns crediting an indigent's incarceration time when the indigent has been unable to post bail.[67] Traditionally, courts have failed to recognize equal protection issues in this situation.[68] Two United States Supreme Court decisions initiated a movement toward equal protection recognition. In *Williams v. Illinois*,[69] the Supreme Court held the maximum statutory period of incarceration for any given offense—once served—could not be augmented and extended by continuing to hold indigent prisoners in jail for non-payment of attendant fines.[70] One year later, the Court expanded this rule in *Tate v. Short*[71] by holding that an equal protection violation occurred when indigent defendants were jailed solely because of an inability to pay a fine.[72] Many lower courts, recognizing the logical extension of the Supreme Court's *Williams* and *Tate* holdings, have determined that the equal protection clause dictates that pre-trial incarceration be credited in cases when it is the result of the defendant's indigency.[73]

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[67] In its account of the facts, the supreme court parenthetically mentioned that Holland had been unable to post $50,000 bail while incarcerated in Indiana. 418 So. 2d at 74.

[68] A. CAMPBELL, LAW OF SENTENCING § 47 (1978); *see, e.g.*, State v. Walker, 277 N.C. 403, 177 S.E.2d 868, 870 (1979). *See generally* Stacy, *Constitutional Right to Sentence Credit for Pre-Trial Incarceration*, 41 U. CIN. L. REV. 823 (1972) (discussing various aspects of sentence credit controversy).

[69] 399 U.S. 235 (1970). The defendant was convicted of petty theft and received a sentence of one year and a fine of $500 plus $5 in court costs. This was the maximum sentence allowed by law. At the end of the defendant's one year sentence, he remained in jail for 101 days to "work off" the fine at a rate of $5 per day. *Id.* at 236-38.

[70] *Id.* at 241.

[71] 401 U.S. 395 (1971). The defendant was committed to a prison farm because he was unable to pay accumulated traffic fines. *Id.* at 396.

[72] *Id.* at 398. *See generally* CAMPBELL, *supra* note 68, § 47, at 170 (explaining the *Williams* and *Tate* holdings).

[73] Stacy, *supra* note 68, at 829; *see, e.g.*, Johnson v. Prast, 548 F.2d 699, 702 (7th Cir. 1977) (equal protection clause requires consideration by judge of presentence custody resulting from inability to post bond); Hart v. Henderson, 449 F.2d 183, 185 (5th Cir. 1971) (inability of indigent to make bond should not result in extension of duration of confinement past statutory maximum); White v. Gilligan, 351 F. Supp. 1012, 1015 (S.D. Ohio 1972) (statute prohibiting pretrial incarceration sentence credit held to violate equal protection); Walters v. State, 259 Ark. 447, 533 S.W.2d 517, 518 (1976) (sentence reduced by amount of time defendant spent in jail while unable to make bail); Klimas v. State, 75 Wis. 2d 244, 249 N.W.2d 285, 287 (1977) (when pretrial custody is due to indigency, ultimate sentence must be reduced by credit for custody).

The Mississippi Supreme Court, though not interpreting MISS. CODE ANN. § 99-19-23 (1972), held in Brown v. State, 217 So. 2d 521 (1969), that the time defendant served because of his inability to make bond was properly deductible from his sentence. *Id.* at 523; *see supra* note 58.

The second issue, which Mississippi has addressed, concerns the allowance of presentence credit for time spent in another jurisdiction while awaiting extradition.[74] Courts in several states have construed statutes granting presentencing credit to include incarceration in jails in other jurisdictions while the defendant awaits extradition to the receiving state.[75] Other courts have denied credit by employing a rationale similar to that utilized by the Mississippi Supreme Court in *Holland*.[76] This rationale is that the prisoner must bring himself within the confines of the law to obtain pre-trial credit and should not be allowed, by his own acts, to begin the running of a sentence until he rightfully presents himself for trial or incarceration under a sentence.[77] The position taken by the supreme court in *Holland* has been deemed untenable in other jurisdictions because the denial of credit for time spent while exercising rights regarding extradition is tantamount to a penalty for the assertion of those rights and, therefore, is a violation of due process.[78]

In *Holland*, the supreme court's opinion is void of an adequate analysis of the two issues discussed above. But it cannot be said with certainty that, had the court engaged in this analysis, its decision would be different. This discussion, nevertheless, brings to light the inherent weaknesses of the court's across-the-board denial of credit for confinement in other jurisdictions. The potential confusion created by such cursory treatment of an important issue is the most significant aspect of the *Holland* decision.

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[74] *See supra* notes 59-65 and accompanying text.

[75] Schornhorst, *Presentence Confinement and the Constitution: The Burial of Dead Time*, 23 HASTINGS L.J. 1041, 1087 (1971-1972); *see, e.g.*, People *ex rel.* Bradley v. Davies, 17 Ill. App. 3d 920, 309 N.E.2d 82, 83 (1974) (time Illinois defendant spent in Indiana fighting extradition credited to sentence); People v. Havey, 11 Mich. App. 69, 160 N.W.2d 629, 636 (1968) (right to sentencing credit includes time spent in other jurisdictions while awaiting extradition). *But see* Kurlin v. State, 302 So. 2d 147, 151 (Fla. Dist. Ct. App. 1974) (statute allowing pretrial credit not applicable to time spent incarcerated in other jurisdictions).

[76] Schornhorst, *supra* note 75, at 1087; *see, e.g.*, State *ex rel.* Crist v. Bomar, 211 Tenn. 420, 365 S.W.2d 295, 298 (1963); *see supra* note 65.

[77] Schornhorst, *supra* note 75, at 1087-88; *see, e.g.*, State *ex rel.* Crist v. Bomar, 211 Tenn. 420, 365 S.W.2d 295, 298 (1963) (defendant not allowed presentence credit for time spent fighting extradition to eventual sentencing jurisdiction).

[78] Schornhorst, *supra* note 75, at 1088. *See generally* CAMPBELL, *supra* note 68, §§ 41-68 (discussing various constitutional considerations involved with denial of pretrial and presentence credit).

IV. Amendments to the Uniform Criminal Rules of Circuit Court Practice

On October 26, 1982, the Supreme Court of Mississippi entered an order approving amendments to the Uniform Criminal Rules of Circuit Court Practice.[79] Two of the amendments are particularly noteworthy.[80]

A. Rule 1.02: Arrest Without a Warrant

Prior to amendment, rule 1.02 provided that an officer could arrest any person without a warrant "when a felony has been committed, and the officer has reasonable grounds to believe the person proposed to be

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[79] *In re* the Amendments to the Uniform Circuit Court Rules and the Uniform Criminal Rules of Circuit Court Practice, Misc. No. 923 (Miss. 1982).

[80] Amendments not treated textually include those to Miss. Unif. Crim. R. Cir. Ct. P. 1.04 (Initial Appearance), *reprinted in* Miss. Att. Desk Book (Miss. L.J.) CI-56 (1977), *id.* 1.06 at CI-18 (Bail Bonds), *id.* 4.04 at CI-31 (Severance), *id.* 4.09 at CI-37 (Omnibus Hearing), and *id.* 6.04 at CI-56 (Procedure for Proof of Prior Convictions Under the Habitual Criminal Statute).

The amendment to rule 1.04 substitutes the phrase "without unnecessary delay" for the word "forthwith." The first sentence of the rule now reads: "Every arrested person shall be taken before a judicial officer without unnecessary delay."

The amendments to rule 1.06 ensure that the trial judge retains discretion in the matter of bail bonds. The amendment inserts the phrase "in the discretion of the trial judge" into paragraph one. The paragraph now reads: "Excessive bail shall not be required, and all persons shall, before conviction, be, in the discretion of the trial judge, bailable as provided in this rule except for offenses punishable by death when the proof is evident or presumption great." The amendment further provides that one or more of the seven requirements for bail bond may be waived in the discretion of the trial judge.

The amendment to rule 4.04 substitutes the phrase "not involving the death penalty" for the phrase "less than capital." The first sentence of the rule now reads: "The granting or refusing severances of defendants in cases not involving the death penalty shall be in the discretion of the trial judge."

The amendment to rule 4.09 substitutes the word "state" for the word "government" in section A of Appendix A. Item 5(h) now reads: "Any information state has, indicating entrapment of the defendant (has been) (will be) supplied."

The amendments to rule 6.04 make two changes. First, various statutes are substituted into the first paragraph to replace § 99-19-83. The first paragraph now reads: "In cases involving enhanced punishment for subsequent offenses under state statutes, including but not limited to, the Habitual Criminal Statute, Miss. Code Ann. §§ 99-19-81 and 99-19-83 and the Uniform Controlled Substances Law, Miss. Code Ann. § 41-29-147."

Second, the amendments altered paragraph three so it now reads: "If the defendant is convicted or enters a plea of guilty on the principal charge, a hearing before the court without a jury will then be conducted on the previous convictions."

arrested committed it."[81] As amended, the rule now allows an officer to make a warrantless arrest "when the officer has reasonable grounds to believe a felony has been committed and the person proposed to be arrested committed it."[82]

The amendment does not make substantive changes to the existing law. A statute similar to rule 1.02, prior to its amendment, has existed in Mississippi for years[83] and is now codified at section 99-3-7 of the Mississippi Code.[84] In *McCollum v. State*,[85] the Mississippi Supreme Court interpreted this statute to require officers, before making a warrantless arrest, to have absolute knowledge that a felony had been committed.[86] *McCollum*, however, is not consistent with a long line of supreme court cases that have abandoned this literal interpretation of the statute and have held that "an officer without a warrant may arrest a person when he has reasonable cause to believe that a felony has been committed, and reasonable cause to believe that such person committed it."[87] The amendment clarifies the language of the rule to coincide with decisions of the Mississippi Supreme Court.[88]

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[81] MISS. UNIF. CRIM. R. CIR. CT. P. 1.02.

[82] *Id., reprinted as amended*, MISS. ATT. DESK BOOK (MISS. L.J.) CI-15 (1977).

[83] *See* MISS. CODE ANN. § 2470 (1942).

[84] MISS. CODE ANN. § 99-3-7 (1972) provides:

> An officer or private person may arrest any person without warrant, for an indictable offense committed, or a breach of the peace threatened or attempted in his presence; or when a person has committed a felony, though not in his presence; or when a felony has been committed, and he has reasonable ground to suspect and believe the person proposed to be arrested to have committed it; or on a charge, made upon reasonable cause, of the commission of a felony by the party proposed to be arrested. And in all cases of arrests without warrant, the person making such arrest must inform the accused of the object and cause of the arrest, except where he is in the actual commission of the offense, or is arrested on pursuit.

[85] 197 So. 2d 252 (Miss. 1967).

[86] *Id.* at 255.

[87] Bradshaw v. State, 192 So. 2d 387, 388 (Miss. 1966), *cert. denied*, 389 U.S. 941 (1967); *see* Lathers v. United States, 396 F.2d 524, 527 (5th Cir. 1968) (warrantless arrest allowed when officer has reasonable cause to believe felony has been committed); Nash v. State, 207 So. 2d 104, 107 (Miss. 1968) (same); Craft v. State, 202 Miss. 43, 49, 30 So. 2d 414, 415-16 (1947) (same).

[88] The Mississippi view on this issue is similar to that of a majority of the other states. *See, e.g.*, State v. Newson, 26 Conn. Sup. 297, 222 A.2d 236, 238 (1966); Pegueno v. State, 85 So. 2d 600, 602 (Fla. 1956); Thurman v. State, 162 Ind. App. 267, 319 N.E.2d 151, 154 (1974); State v. Caffey, 436 S.W.2d 1, 2 (Mo. 1969). *See generally* 6A C.J.S. *Arrest* § 19 (1975) (discussion of warrantless arrest made on suspicion of felony).

B. Rule 4.06: Discovery

Prior to amendment, paragraph one of rule 4.06 required the prosecution to disclose to each defendant, or his attorney upon request, without further order the "(1) Names and addresses of all witnesses in chief proposed to be offered by the prosecution at trial; [and] (2) Copy of any recorded statement of the defendants to any law enforcement officer."[89]

The amendment adds four new items to the above list:

> (3) Copy of the criminal record of the defendant, if proposed to be used to impeach; (4) Copy of crime lab reports or report or any tests made; (5) Exhibit any physical evidence and photos to be offered in evidence; and (6) Copy of any excuplatory material concerning defendant.[90]

Discovery in criminal proceedings has never been comparable to that in civil proceedings. At common law, discovery was severly limited in both federal and state criminal proceedings[91] because of the nature of the issues, the danger of intimidation of witnesses, the greater danger of perjury and subornation of perjury, and the high burden of proof that the prosecution must meet.[92] Over the last twenty years major changes in the discovery laws have been made.[93] The Mississippi courts have contributed to this trend[94] as evidenced by the adoption of the amendments that provide for more liberal discovery in criminal proceedings. The Mississippi rule is now similar to rule 16 of the Federal Rules of Criminal Procedure[95] and rule 421 of the Uniform Rules of

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[89] MISS. UNIF. CRIM. R. CIR. CT. P. 4.06.

[90] *Id., reprinted as amended,* MISS. ATT. DESK BOOK (MISS. L.J.) CI-31 (1977).

[91] Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962), *cert. denied,* 371 U.S. 955 (1963).

[92] *See* 23 AM. JUR. 2d *Depositions and Discovery* § 307 (1965) (right of accused to discovery at common law).

[93] Datz, *Discovery in Criminal Procedure,* 16 U. FLA. L. REV. 163, 164, 174 (1963).

[94] *See supra* notes 85-87.

[95] FED. R. CRIM. P. 16 (1975) provides in part:

> (A) **Statement of Defendant.** Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant . . . ; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant . . . ; and recorded testimony of the defendant before a grand jury which relates to the offenses charged.
>
> (B) **Defendant's Prior Record.** Upon request of the defendant, the government shall furnish to the defendant such copy of his prior criminal record . . . .

Criminal Procedure.[96]

David L. Ayers
Stephen Greubel

(C) **Documents and Tangible Objects.** Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies thereof . . . .

(D) **Reports of Examinations and Tests.** Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof . . . .

[96] UNIF. R. CRIM. P. 421 (1974) provides in part:

Upon the defendant's written request, the prosecuting attorney . . . shall allow access at any reasonable time to all matters within the prosecuting attorney's possession or control which related in any way to the case, including statements, reports, expert reports, reports on prospective jurors, papers, photographs, objects, and places, and the identity of persons having information relating to the case.

TORTS

In 1982, the Mississippi Supreme Court decided twenty cases in the area of tort law, five of which have been chosen for commentary. The decisions not warranting textual treatment dealt with negligence,[1] assumption of risk,[2] qualified immunity,[3] remittitur,[4] legal and medical malpractice,[5] fraudulent conveyance[6] and conversion.[7] Additionally, the Mississippi Legislature enacted several statutes in 1982 pertaining to tort law.[8]

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[1] DeVille Furniture Co. v. Jesco, Inc., 423 So. 2d 1337, 1341 (Miss. 1982) (ten-year statute of limitations for actions arising from construction defects applied whether alleged deficiency is patent or latent); Porter v. Pandey, 423 So. 2d 126, 127 (Miss. 1982) (hospital under no duty to supervise attending physician's diagnosis or treatment because hospital not authorized to practice medicine); Gallent v. Louisville & Nashville R.R., 420 So. 2d 1068, 1071 (Miss. 1982) (railroad not guilty of failure to exercise ordinary care in warning public at crossing); Harper v. Hudson, 418 So. 2d 54, 55-56 (Miss. 1982) (evidence raised jury issue as to whether contractor took proper measures to protect house from impending storm); City of Starkville v. Harrison, 418 So. 2d 51, 52 (Miss. 1982) (electric companies not absolute insurers); Woods v. Nichols, 416 So. 2d 659, 667 (Miss. 1982) (disabled vehicle left protruding onto roadway not proximate cause of accident); Dorsey v. Johnson, 411 So. 2d 1282, 1283-84 (Miss. 1982) (issue of negligence not proper subject for peremptory instruction).

[2] McLeod v. Whitten, 413 So. 2d 1020, 1023 (Miss. 1982) (plaintiff assumed risk in off-the-road vehicular accident when defendant operated vehicle in reasonable manner).

[3] Saunders v. Mullins, 412 So. 2d 245, 245-46 (Miss. 1982) (on rehearing) (local government may only be sued under 42 U.S.C. § 1983 (Supp. 1980) if alleged injury resulted from execution of government's policy or custom).

[4] Schoppe v. Applied Chem. Div., Mobley Co., Inc., 418 So. 2d 833, 837 (Miss. 1982) (trial judge erred by disregarding appellant's evidence in decision to reduce jury award by two-thirds); Wade v. Bonner, 409 So. 2d 1333, 1335 (Miss. 1982) (lower court did not abuse its discretion by entering remittitur of $400,000).

[5] King v. Murphy, 424 So. 2d 547, 550 (Miss. 1982) ("locality" rule in malpractice actions expanded to include area within state and for reasonable distance adjacent to state boundaries); Dean v. Conn, 419 So. 2d 148, 150, 154 (Miss. 1982) (defendant failed to exercise degree of care, skill, knowledge, and ability possessed by members of legal profession in his locality in preparing title certificate). *King v. Murphy* is tentatively scheduled to be noted in the June issue of the MISSISSIPPI LAW JOURNAL.

[6] Morgan v. Sauls, 413 So. 2d 370, 371, 374 (Miss. 1982) (conveyances of real property by defendant before date of alleged tort not made with intent to defraud plaintiffs).

[7] Johnston v. Stinson, 418 So. 2d 805, 806 (Miss. 1982) (no damages allowed debtor when secured party peacefully repossessed property in accordance with statutory self-help procedure).

[8] Acts passed by the legislature in 1982 affecting tort law include: Act of Apr. 20, 1982, ch. 459, 1982 Miss. Laws 543 (amending MISS. CODE ANN. § 37-29-85 (1972)) (waiving sovereign immunity in actions against boards of trustees and employees of public

I. Liability of Merchant for Injuries to Patrons Arising from Third Party's Criminal Acts

Kelly v. Retzer & Retzer, Inc.[9] presented an issue of first impression to the Mississippi Supreme Court. In *Kelly*, the court refused to hold a business owner liable for a patron's death that occurred because of the unforeseeable criminal acts of third parties.[10]

The Kelly family brought suit against Retzer & Retzer, Inc., owner of a restaurant franchise, for their son's death, which occurred in the restaurant parking lot.[11] The complaintants alleged that their son's death resulted from the defendant's negligent failure to provide adequate security and safe premises for its patrons.[12] The trial court granted the defendant's motion for a directed verdict. On appeal, the Mississippi Supreme Court unanimously affirmed the action of the trial court. Because restaurant personnel regularly checked its premises for loiterers and because Kelly voluntarily participated in a spontaneous, dangerous encounter with another armed youth, the defendant could not be held liable. The court reasoned that the responsibility for effective law enforcement rests not with the proprietor but rather with local government.[13]

The general rule in Mississippi requires an owner of a business to exercise reasonable care in maintaining safe conditions for patrons, but does not render the owner an absolute insurer of their safety.[14] The *Kelly* court noted that although it is foreseeable that a crime could occur anywhere and at any time,[15] foreseeability alone does not give rise to a duty to provide "police" protection.[16] The cost of this protec-

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junior colleges to extent of liability insurance coverage); Act of Mar. 25, 1982, ch. 407, 1982 Miss. Laws 331-32 (amending Miss. Code Ann. § 13-1-21 (1972)) (any action against a physician, dentist, hospital or hospital employee constitutes an implied waiver of the medical privilege); Act of Mar. 22, 1982, ch. 392, 1982 Miss. Laws 287-88 47 (amending Miss. Code Ann. § 63-17-55 (1972)) (specifically includes motorcycles within definition of motor vehicle); Act of Mar. 19, 1982, ch. 370, 1982 Miss. Laws 242 (codified at Miss. Code Ann. § 41-13-1 (Supp. 1982)) (authorizes hospitals to establish trusts for payment of malpractice claims).

[9] 417 So. 2d 556 (Miss. 1982).

[10] *Id.* at 563.

[11] *Id.* at 557.

[12] *Id.*

[13] *Id.* at 562-63.

[14] *See, e.g.*, J.C. Penney Co. v. Sumrall, 318 So. 2d 829, 832 (Miss. 1975); Stanley v. Morgan & Lindsey, 203 So. 2d 473, 476 (Miss. 1967); Sears, Roebuck & Co. v. Tisdale, 185 So. 2d 916, 917 (Miss. 1966).

[15] 417 So. 2d at 561.

[16] *Id.*

tion would be prohibitive for most small businesses.[17] This duty, therefore, only arises when the merchant is aware of specific, prior criminal acts of the same type that caused harm to the plaintiff.[18]

Generally, three approaches have been developed to determine the extent of a proprietor's responsibility to protect patrons from criminal acts. Accordingly, courts have held that the proprietor either has no duty,[19] has a limited duty,[20] or has a general duty[21] as provided in section 344 of the *Restatement (Second) of Torts*.[22]

The Oklahoma Supreme Court in *Davis v. Allied Supermarkets, Inc.*,[23] refused to impose any duty on a proprietor.[24] The plaintiff was the victim of a purse-snatching assault in the defendant's parking lot. Adopting a proximate cause approach, the Oklahoma court found the third party's criminal act to be an independent, intervening cause of the plaintiff's injuries.[25]

The limited duty rule is an attempt by the courts to create an incentive for the proprietor to protect customers from a third party's criminal acts but not make the proprietor an absolute insurer of their safety. Under the limited duty rule, no duty exists unless the plaintiff proves that the merchant knew or had reason to know of specific instances of prior criminal acts of the same type that caused harm to the

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[17] 417 So. 2d at 562.

[18] The court relied on Cook v. Safeway Stores, Inc., 354 A.2d 507, 508 (D.C. 1976) *citing* Viands v. Safeway Stores, Inc., 107 A.2d 118, 121 (D.C. 1954). *See also* Jones v. Leon, 3 Wash. App. 940, 478 P.2d 778, 783 (1970) (test of foreseeability is whether intervening acts of third persons are so highly extraordinary or improbable as to be wholly beyond range of expectability).

[19] *See infra* notes 23-26 and accompanying text.

[20] *See infra* notes 27-31 and accompanying text.

[21] *See infra* notes 32-39 and accompanying text.

[22] The RESTATEMENT (SECOND) OF TORTS § 344 (1965) provides:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to
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> (a) discover that such acts are being done or are likely to be done, or
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> (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

[23] 547 P.2d 963 (Okla. 1976).

[24] *Id.* at 965.

[25] *Id.* at 963, 965. The court rationalized its holding by stating that had the proprietor been found negligent, the financial loss caused by the crime would merely have been shifted from one innocent victim, the proprietor, to another, the consuming public. *Id.* at 965.

plaintiff.[26]

The limited duty rule was applied in *Viands v. Safeway Stores, Inc.*,[27] in which the court held that because the defendant storeowner had specific knowledge of the presence of a troublesome gang of juveniles, the merchant had a duty to protect customers from any injury that the gang may have caused.[28] The Tennessee Supreme Court has also adopted the limited duty rule. In *Cornpropst v. Sloan*,[29] the plaintiff was attacked in the parking lot of the defendant's store.[30] The Tennessee court held that even though various assaults had previously occurred in the same parking lot, there was no justification for imposing a duty upon the defendant unless the defendant knew of the "imminent probability" of harm to a patron.[31]

Section 344 of the *Restatement (Second) of Torts* imposes a duty on the merchant, whenever he has knowledge of general criminal activity, either to protect his visitors or to give them adequate warning, thereby enabling them to protect themselves.[32] The *Restatement*'s expansion of the scope of foreseeability is illustrated in *Morgan v. Bucks Associates*.[33] The plaintiff, who was assaulted in the defendant's shopping center, alleged that the defendant had notice of prior criminal activity.[34] The defendant argued that because the prior criminal activity involved car thefts, it was not foreseeable that an assault would occur.[35] The Pennsylvania federal district court held that the mere knowledge of general criminal activity was sufficient to impose a duty on the proprietor to protect patrons from assault.[36]

Texas courts also have broadly interpreted the *Restatement* rule, as evidenced by *Walkoviak v. Hilton Hotels Corp.*[37] In that case, the

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[26] *See, e.g.*, Relyea v. State, 385 So. 2d 1378, 1382-83 (Fla. Dist. Ct. App. 1980) (landowner has limited duty to protect an invitee from criminal acts of a third person when he had actual or constructive knowledge of prior, similar criminal acts).

[27] 107 A.2d 118 (D.C. 1954).

[28] *Id.* at 119, 121. *See also* Cook v. Safeway Stores, Inc., 354 A.2d 507, 507-08 (D.C. 1976) (limited duty of proprietor to provide protection for customers when numerous purse-snatching incidents occurred in the neighborhood).

[29] 528 S.W.2d 188 (Tenn. 1975).

[30] *Id.* at 190.

[31] *Id.* at 199 (*citing* Corbitt v. Ringley-Crockett, Inc., 496 S.W.2d 914, 919 (Tenn. App. 1973)).

[32] RESTATEMENT (SECOND) OF TORTS § 344(b) (1965); *see supra* note 19.

[33] 428 F. Supp. 546 (E.D. Pa. 1977).

[34] *Id.* at 547-48.

[35] *Id.* at 550.

[36] *Id.* at 551.

[37] 580 S.W.2d 623 (Tex. Civ. App. 1979).

Texas Court of Civil Appeals expanded the merchant's duty to protect patrons by broadening the definition of a merchant's "premises." The plaintiff was attacked in the hotel parking lot. Similar robberies had taken place in the general vicinity of the hotel.[38] The court interpreted the foreseeability requirement as creating a duty on the proprietor to determine what effect crimes in the vicinity of the hotel might have on guests and to take measures necessary to protect the guests.[39]

The distinction between the *Restatement (Second)* rule and the limited duty rule lies in the scope and application of foreseeability concepts. The jurisdictions following the *Restatement (Second)* rule require only a knowledge of general criminal activity and the jurisdictions adhering to the limited duty rule require knowledge of specific criminal acts of the same type that caused harm to the plaintiff. Mississippi, in *Kelly*, adopted the limited duty rule.[40]

II. Sovereign Immunity as a Defense to Tort Liability

In *Anderson v. Jackson Municipal Airport Authority*,[41] the Mississippi Supreme Court held that in the absence of a specific grant of immunity in the Airport Authorities Law,[42] the defendant airport authority was not immune from tort liability.[43]

Anderson, an Alabama resident, brought suit against the Jackson Municipal Airport Authority (JMAA) for injuries sustained when he fell from a faulty scaffolding owned by JMAA. The federal district court granted JMAA's motion for summary judgment on the ground of sovereign immunity.[44] On appeal, the Fifth Circuit Court of Appeals certified the question pursuant to Mississippi Supreme Court Rule 46.[45] In its opinion, the supreme court reaffirmed the rule that the operation of an airport by a municipality is a proprietary activity and,

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[38] *Id.* at 624-25.

[39] *Id.* at 625-26. The Texas Court of Civil Appeals has further expanded the Restatement rule by shifting the burden of proof to the defendant to disprove the requirement of the rule even though there had been no allegation of prior criminal activity. Morris v. Barnette, 553 S.W.2d 648, 648-50 (Tex. Civ. App. 1977).

[40] 417 So. 2d at 562-63. *See generally* note, *Merchant's Duty to Protect its Customers from Third-Party Criminal Acts*, 18 Wake Forest L. Rev. 114, 118-26 (1982) (discussing the three approaches concerning proprietor's duty to protect customers from third-party criminal acts).

[41] 419 So. 2d 1010 (Miss. 1982).

[42] Miss. Code Ann. §§ 61-3-1 to -83 (1972 & Supp. 1982).

[43] 419 So. 2d at 1020.

[44] *Id.* at 1021-22.

[45] *Id.* at 1021.

therefore, the municipality is not immune from tort liability.[46] The court noted that the Municipal Airport Law,[47] passed on the same day as the Airport Authorities Law,[48] contained language that specifically granted immunity to the municipality,[49] but the Airport Authorities Law stated only that the operation of an airport was a "governmental function."[50] The court reasoned that because the legislature, with full knowledge of the court's prior decisions, passed the two acts on the same day, the lack of a specific grant of immunity in the Airport Authorities Law indicated that the legislature did not intend airports that operated under the act to be immune from suit.[51] In a dissenting opinion, Justice Sugg stated that the legislature had granted immunity to the airport authority by making the municipal operation of an airport a "governmental function," and that it was not within the court's authority to question the legislature's declaration of public policy.[52]

III. Expanding Liability for Negligent Infliction of Emotional Distress

In *Entex, Inc. v. McGuire*,[53] the Mississippi Supreme Court enlarged the liability for negligent infliction of emotional distress by expanding the zone of danger rule through the use of a foreseeability test. In *McGuire*, workers for the city of McComb inadvertently ruptured a natural gas pipeline near the plaintiffs' home while attempting to repair a city-owned water line.[54] After notifying the gas utility, Entex, Mr. McGuire went to his garden unaware that a large volume of gas was being trapped inside his house. Moments later, Mrs. McGuire lit a cigarette that ignited the gas and caused an explosion. Mr. McGuire entered the flaming structure to rescue his wife.[55] Mrs. McGuire suffered permanent injuries and Mr. McGuire suffered anxiety and depressive neurosis, which resulted from the near loss of his wife.[56] The

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[46] *Id.* at 1010; *accord* City of Jackson v. Brummett, 224 Miss. 501, 507, 80 So. 2d 827, 829 (1955) (no immunity from tort liability given to municipality engaging in proprietary activity).

[47] Miss. Code Ann. §§ 61-5-1 to -91 (1972 & Supp. 1982).

[48] *Id.* §§ 61-3-1 to -83.

[49] *Id.* § 61-5-47 (1972).

[50] *Id.* § 61-3-83.

[51] 419 So. 2d at 1012-13.

[52] *Id.* at 1024.

[53] 414 So. 2d 437 (Miss. 1982).

[54] *Id.* at 439.

[55] *Id.*

[56] *Id.* at 443-44.

McGuires sued Entex and the city of McComb for personal injuries and property damage.[57] The lower court overruled Entex's motion for a directed verdict and the jury found that both defendants were negligent.[58]

On appeal, the Mississippi Supreme Court ruled that the initial burden was on the city of McComb to ascertain the location of the gas lines and, because it had failed to do so, the trial court should have granted the directed verdict requested by Entex.[59] Affirming Mr. McGuire's $30,000 personal injury award, the court first noted that *First National Bank v. Langley*[60] abolished the impact rule and introduced the zone of danger rule to Mississippi.[61] The court proceeded to expand the zone of danger rule by adopting the three-part test of foreseeability first enunciated in 1968 by the California Supreme Court in *Dillon v. Legg*.[62] The three factors applied to determine whether the plaintiff's injury was foreseeable by the defendant are:

> (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.[63]

In *Langley*, the plaintiff recovered damages for emotional distress despite the absence of any direct physical impact.[64] The *McGuire* court, through the use of the *Dillon* factors, expanded the zone of dan-

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[57] *Id.* at 438.

[58] *Id.* at 438-39.

[59] *Id.* at 443.

[60] 314 So. 2d 324 (Miss. 1975).

[61] *Id.* at 339. The *Langley* court stated:

> Where negligence proximately caused fright, in one within the immediate area of physical danger from that negligence, which in turn produced physical consequences such as would be elements of damage if a bodily injury had been suffered, the injured party is entitled to recover under an application of the prevailing principles of law as to negligence and proximate causation.

Id. at 333 (quoting Rabb v. Pennsylvania-[68]58 Del. 454, 464, 210 A.2d 709, 714-15 (1965)).

[62] 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

[63] 441 P.2d at 920, 69 Cal. Rptr. at 80, *quoted in McGuire*, 414 So. 2d at 437.

[64] 414 So. 2d at 339.

ger test by allowing one not in the zone of actual physical risk to recover for emotional distress caused by the observance of an accident involving a close relative.[65]

The *Dillon* test has been criticized by other courts. For example, the New York Court of Appeals, in *Tobin v. Grossman,*[66] noted two weaknesses in the *Dillon* test. First, foreseeability is not easily limited.[67] For example, if a mother may recover, other caretakers, such as grandparents who are equally sensitive, could also recover. Thus, foreseeability could logically extend to any caretaker and even to affected bystanders.[68] Second, the *Dillon* test of foreseeability is misleading because the factors are beyond the control of the defendant. The defendant's negligence, for example, is not enhanced simply because the mother, and not a total stranger, witnessed the accident.[69]

The *Tobin* court's criticism is perceptive; subsequent decisions utilizing the *Dillon* test have produced inconsistent results. In *Archibald v. Braverman,*[70] a California appeals court allowed recovery for emotional distress when a mother rushed to the scene of a gunpowder explosion to find her son severely injured. The court ruled that the plaintiff met the three *Dillon* factors.[71] First, because the shock of seeing a child injured is equally profound regardless of whether the accident was actually witnessed or merely observed immediately after the accident, the mother's shock "was 'contemporaneous' with the explo-

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[65] 414 So. 2d at 444. The *Dillon* court, in addressing the expansion of the danger zone, stated:

> The concept of the zone of danger cannot properly be restricted to the area of those exposed to *physical* injury; it must encompass the area of those exposed to *emotional* injury. The courts, today, hold that no distinction can be drawn between physical injury and emotional injury flowing from the physical injury; indeed, in the light of modern medical knowledge, any such distinction would be indefensible. As a result, in awarding recovery for emotional shock upon witnessing another's injury or death, we cannot draw a line between the plaintiff who is in the zone of danger of physical impact and the plaintiff who is in the zone of danger of emotional impact. The recovery of the one, within the guidelines set forth *infra,* is as much compelled as that of the other.

68 Cal. 2d at 740-41 n.5, 441 P.2d at 920 n.5, 69 Cal. Rptr. at 80 n.5.

[66] 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

[67] 249 N.E.2d at 424, 301 N.Y.S.2d at 558.

[68] *Id.*, 301 N.Y.S.2d at 558.

[69] *Id.*, 301 N.Y.S.2d at 558; *see also* Comment, *Limiting Liability for the Negligent Infliction of Emotional Distress: The "Bystander Recovery Cases,"* 54 S. CAL. L. REV. 847, 858 (1981)(critique of *Dillon* test).

[70] 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969).

[71] 79 Cal. Rptr. at 724-25.

sion,"[72] thus satisfying the observance factor. The relationship and nearness tests were met because one who injures a child should reasonably expect the mother to be near and should also expect her resulting emotional distress upon witnessing the event.[73]

Another California appeals court, in *Deboe v. Horn*,[74] however, did not allow a wife to recover when she saw her husband in the hospital after an accident and learned that he was totally paralyzed.[75] The court denied recovery because the plaintiff failed to specifically plead facts which would give rise to a cause of action for injuries resulting from emotional distress.[76] The case of *Arauz v. Gerhardt*,[77] further complicates the application of the *Dillon* test in California. In *Arauz* the mother rushed to the scene of an auto accident to find her son with blood on his forehead, but fully conscious.[78] The court refused to allow recovery and attempted to distinguish *Arauz* from *Archibald.* The *Arauz* court hypothesized that the mother in *Archibald* could mentally reconstruct and envision the accident.[79] The court concluded that Mrs. Arauz, on the other hand, could not have made such a reconstruction,[80] but the court never stated its reason for that conclusion.

Tobin, Archibald, Deboe, and *Arauz* illustrate the inadequacies of the *Dillon v. Legg* test.[81] The Mississippi Supreme Court should formulate rational restrictions on the newly-adopted *Dillon* test.

IV. Extending the Time at Which the Statute of Limitations Begins to Run in Medical Malpractice Cases

The new statute of limitations for medical malpractice, section 15-1-36 of the Mississippi Code,[82] was applied by the Mississippi Supreme

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[72] *Id.* at 725.

[73] *Id.* at 724-25.

[74] 16 Cal. App. 3d 221, 94 Cal. Rptr. 77 (1971).

[75] 94 Cal. Rptr. at 78-79.

[76] *Id.* at 79.

[77] 68 Cal. App. 3d 937, 137 Cal. Rptr. 619 (1977).

[78] 137 Cal. Rptr. at 621-22.

[79] *Id.* at 626.

[80] *Id.* at 627.

[81] *See supra* notes 68-71 and accompanying text.

[82] Miss. Code Ann. § 15-1-36 (Supp. 1981) provides:

(1) No claim in tort may be brought against a licensed physician, osteopath, dentist, hospital, nurse, pharmacist or podiatrist for injuries arising out of the course of medical or surgical treatment unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered. However, if at the time at which the cause of action shall, or with reasonable diligence might have been

Court in *Tribou v. Gunn*.[83] The court ruled that because the plaintiff filed suit within two years after learning of her cancer, her suit was not barred.[84] From 1972 to 1977 the defendant doctor diagnosed the plaintiff's condition as chronic cystic mastitis of the right breast. It was not until another physician advised the plaintiff that she had breast cancer that the defendant, in 1978, first diagnosed the condition as breast cancer and performed a radical mastectomy.[85] The plaintiff filed suit based upon a series of acts or omissions allegedly constituting medical malpractice by the defendant. The lower court dismissed the action as barred by the statute of limitations.[86] On appeal, the Mississippi Supreme Court held that because the plaintiff could not have discovered, by the exercise of reasonable diligence, the true nature of her condition before May 1978, her suit was not barred by the statute of limitations.[87]

Prior to the passage of section 15-1-36, a cause of action for medical malpractice accrued, and the statute of limitations began to run on the date of the wrongful act or omission, not at the time of discovery.[88] Now section 15-1-36 allows a suit for medical malpractice to be filed within two years from the time when the plaintiff, through the exercise

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first known or discovered, the person to whom such claim has accrued shall be under the disability of infancy or unsoundness of mind, then such person or the person claiming through him may, notwithstanding that the period of time hereinbefore limited shall have expired, commence action on such claim at any time within two (2) years next after the time at which the person to whom the right shall have first accrued shall have ceased to be under either disability, or shall have died, whichever shall have first happened. When any person who shall be under either of the disabilities mentioned at the time at which his right shall have first accrued, shall depart this life without having ceased to be under such disability, no time shall be allowed by reason of the disability of such person to commence action on the claim of such person beyond the period prescribed under section 15-1-55.

(2) The limitation established by this section as to a licensed physician, osteopath, dentist, hospital or nurse shall apply only to actions the cause of which accrued on or after July 1, 1976.

(3) The limitation established by this section as to pharmacists shall apply only to actions the cause of which accrued on or after July 1, 1978.

(4) The limitation established by this section as to podiatrists shall apply only to actions the cause of which accrued on or after July 1, 1979.

[83] 410 So. 2d 378 (Miss. 1982).

[84] *Id.* at 379.

[85] *Id.*

[86] *Id.* at 378.

[87] *Id.* at 379.

[88] *See, e.g.*, Smith v. McComb Infirmary Ass'n, 196 So. 2d 91, 92 (Miss. 1967); Wilder v. St. Joseph Hosp., 225 Miss. 42, 45, 82 So. 2d 651, 652 (1955).

of reasonable diligence, knew of or should have discovered the negligent act.[89] This statute allows patients who have received negligent treatment to preserve their rights when the effects of the treatment may not become apparent for years.

This standard raises the issue whether the statute of limitations begins to run when the injury is discovered or when the plaintiff must also have reason to believe that the injury was caused by medical treatment. The majority of states that have addressed this issue have held that the statute of limitations begins to run when the patient learns that there is a causal connection between the injury and the medical care received.[90] The Mississippi Supreme Court has not addresssed this issue.

V. Minor Held to Adult Standard of Care While Operating Self-Propelled Vehicle

In *Davis v. Waterman*,[91] the Mississippi Supreme Court addressed the issue of the presumed incapacity of children between the ages of seven and fourteen to be contributorily negligent in exercising proper care for their own safety.[92] The plaintiff, a thirteen and one-half year old, was killed when he rode his motorbike into the path of the defendant's car. The plaintiff's mother brought suit for the wrongful death of her son, and at trial, the jury found for the defendant.[93] On appeal, the plaintiff alleged that the lower court erred by allowing the question of the decedent's contributory negligence to be decided by the jury.[94] The Mississippi Supreme Court noted that, in general, a presumption exists that a child between the ages of seven and fourteen is incapable of contributory negligence in failing to exercise proper care for his own safety.[95] This presumption, however, could be rebutted by evidence

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[89] 410 So. 2d at 379.

[90] *See* United States v. Kubrick, 444 U.S. 111, 122 (1979) (interpreting the statute of limitations under the Federal Tort Claims Act); Gemignani v. Philadelphia Phillies Nat'l League Baseball Club, Inc., 287 F. Supp. 465, 467 (E.D. Pa. 1967) (interpreting Pennsylvania statute of limitations). For a concise survey of Pennsylvania decisions, see Cuker, *The Statute of Limitations in Medical Malpractice Cases: A Guide*, 51 Pa. B.A.Q. 132 (1980).

[91] 420 So. 2d 1063 (Miss. 1982).

[92] *Id.* at 1065.

[93] *Id.*

[94] *Id.*

[95] *Id.* at 1065; *see, e.g.*, McGee v. Bolen, 369 So. 2d 486, 492 (Miss. 1979); Burlingame v. Southwest Drug Stores of Miss., Inc., 203 So. 2d 74, 77 (Miss. 1967); Moak v. Black, 230 Miss. 337, 351-52, 92 So. 2d 845, 852 (1957).

that the child possessed the requisite discretion to be charged with negligence.[96] Noting that many minors operate motorized vehicles on public roads and that these vehicles are as dangerous as those operated by adults, the court reasoned that minors should be held to the same standard of care as required of adults.[97] The court therefore, in a limited holding, held that anyone who operates a motorized vehicle on a public road will be held to an adult standard of care.[98] Thus, Mississippi now follows the Alabama rule that imposes an adult standard of care on a minor,[99] but limits its application to situations in which a child is operating a motorized vehicle on a public road.[100] All other cases involving contributory negligence of minors remain subject to the rebuttable presumption that the minor is incapable of contributory negligence.[101]

Some authorities have held that a minor cannot meet an adult standard of care and therefore should not be held to one.[102] Another court, however, adopting the victim's perspective, reasons that it is almost impossible to determine, and to compensate for, the other driver's minority when he is driving toward you at a fair rate of speed.[103] In view of the increasing number of minors operating motor vehicles on public highways, the Mississippi Supreme Court has taken a necessary step toward holding minors fully accountable for their negligent acts. This case stands as a warning to parents that their children will be held to an adult standard of care when operating motor vehicles.

James A. Lowe, III

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[96] 420 So. 2d at 1065; *see* Johnson v. Howell, 213 Miss. 195, 198, 56 So. 2d 491, 491-92 (1952) (presumption might be rebutted by evidence that child, due to age, knowledge, experience, and intelligence, possessed the requisite discretion to be charged with negligence).

[97] 420 So. 2d at 1066.

[98] *Id.* at 1067.

[99] *See* Keller v. Kiedinger, 389 So. 2d 129, 133 (Ala. 1980) (14 year-old capable of committing contributory negligence); McNall v. Farmers Ins. Group, 392 N.E.2d 520, 526-27 (Ind. App. 1979) (holding 15 year-old to adult standard of care); McIntyre v. McIntyre, 558 S.W.2d 836, 838 (Tenn. 1977) (minor held to adult standard of care when operating motor vehicle on highway). *See generally* 97 A.L.R.2d 872 (1964) (dealing with age of minor operator of motor-powered vehicle as affecting his primary or contributory negligence).

[100] 420 So. 2d at 1067.

[101] *Id.*

[102] Mosconi v. Ryan, 189 Cal. App. 2d 227, 210 P.2d 259, 262 (1949); Wittmeier v. Post, 78 S.D. 520, 105 N.W.2d 65, 68 (1960).

[103] Gunnells v. Dethrage, 366 So. 2d 1104, 1106 (Ala. 1979).

MISCELLANEOUS

In 1982, the Mississippi Supreme Court decided numerous cases on divorce and separate maintenance,[1] child custody and support,[2] adoption,[3] wills and estates,[4] property law,[5] insurance,[6] and other mis-

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[1] Owen v. Gerity, 422 So. 2d 284, 288 (Miss. 1982) (modification of divorce decree based on sexual misconduct was error; mutual infatuation and opportunity to gratify not sufficient to create presumption of fornication); Wade v. Wade, 419 So. 2d 584, 585 (Miss. 1982) (granting of separate maintenance was error because no evidence was presented to lower court and burden of proving case not met); Duncan v. Duncan, 417 So. 2d 908, 909-10 (Miss. 1982) (burden on divorced husband found in contempt for delinquent child support payments to absolve himself by showing either compliance with decree or inability to comply); Reeves v. Reeves, 410 So. 2d 1300, 1302-03 (Miss. 1982) (wife who had worked on husband's business without pay entitled to share of business as alimony; joint account presumed to be vested in names given on account as equal contributors and owners absent contrary evidence).

[2] De La Oliva v. Lowndes County Dept. of Pub. Welfare, 423 So. 2d 1328, 1332 (Miss. 1982) (unconstitutional standard of proof in terminating parental rights constitutes reversible error); Ross v. Segrest, 421 So. 2d 1234, 1237 (Miss. 1982) (husband's personal income exempt from claims for support of wife's child by former marriage); Mooneyham v. Mooneyham, 420 So. 2d 1072, 1074-75 (Miss. 1982) (social security payments may be credited against court's order for child support, and court may allow increase in child support concurrent with social security increase); Rhodes v. Rhodes, 420 So. 2d 759, 761 (Miss. 1982) (notwithstanding court's power to maintain control over attorneys who practice before it, chancellor had no authority to bar attorney found in contempt for delinquent child support payments from practicing law in chancery court until payments made); Woodruff v. Woodruff, 418 So. 2d 775, 775-76 (Miss. 1982) (mother's helping daughter obtain abortion and her having adulterous affair not material change in circumstances that merits changing custody of five-year-old child from mother to father); Bradshaw v. Bradshaw, 418 So. 2d 64, 64-65 (Miss. 1982) (court that rendered original divorce decree retains jurisdiction to modify child custody order though custodial parent and child moved out of state); Buntyn v. Smallwood, 412 So. 2d 236, 238 (Miss. 1982) (chancellor erred in declining to modify custody decree when material change in circumstances occurred after mother became able to provide stable home); Rankin v. Bobo, 410 So. 2d 1326, 1328-29 (Miss. 1982) (father required to pay for daughter's college education if financially able and daughter qualified for education and displayed love and affection toward father); Bloodworth v. Bloodworth, 409 So. 2d 1336, 1337 (Miss. 1982) (chancellor erred finding father not proper, fit, and suitable to have custody of child without clear showing of abandonment, immoral conduct, or mental or other unfitness); Bracey v. Bracey, 408 So. 2d 1387, 1390 (Miss. 1982) (chancellor abused discretion by awarding increase in support and maintenance of eighteen-year old child who refused to work or attend school).

[3] J.C. v. Natural Parents, 417 So. 2d 529, 531 (Miss. 1982) (when infant resided with foster parents for over a year, chancellor erred in excluding couple from consideration as adoptive parents merely because foster care agreement precluded couple from adopting

before infant was free for adoption); Lucas v. Lucas, 415 So. 2d 709, 711-12 (Miss. 1982) (in adoption proceeding, chancellor erred in ruling on issues other than adoption, such as visitation rights and arrearages in child support); Doe v. Attorney W., 410 So. 2d 1312, 1316-17 (Miss. 1982) (when mother consented to adoption, parental rights of natural father terminated after finding abandonment of unborn illegitimate child and moral unfitness). For a brief discussion of *Doe v. Attorney W.*, see *infra* note 76.

[4] One of the more interesting cases in this area was *In re* Estate of Kidd, No. 53,399, slip op. (Miss. Dec. 1, 1982). In *Kidd*, an illegitimate daughter brought suit against the estate of her alleged father. The lower court held the petitioner's claim was barred by a Miss. Code Ann. § 15-1-49 (1972), which places a six-year statute of limitations on suits to determine heirships. *Kidd*, slip op. at 2. On appeal, the petitioner argued that MISS. CODE ANN. § 91-1-15(2) (Supp. 1982) extended the statute of limitations and saved her cause of action. *Kidd*, slip op. at 5. The court, however, held that the six-year statute of limitations in § 15-1-49 controlled and refused to allow the petitioner to proceed with her suit. In reaching this conclusion, the court held that MISS. CONST. art. IV, § 97 prohibited the legislature from reviving any claim already barred by a statute of limitations of the state. *Kidd*, slip op. at 5. Because § 15-1-49 barred the petitioner's claim in this instance, the court refused to read § 91-1-15(2) as reviving it.

Other cases in this area include: *In re* Estate of Atkins, 422 So. 2d 754, 757 (Miss. 1982) (only upon securing court order to use funds for ward's necessities may conservator withdraw funds from joint account of ward and another party during life of joint parties); Brown v. McAfee, 421 So. 2d 1061, 1063-64 (Miss. 1982) (chancellor erred ordering sale of real estate at public auction absent proof of debts due and expenses of estate); Hendricks v. James, 421 So. 2d 1031, 1043-46 (Miss. 1982) (when decedent made inter vivos transfer of entire estate to fiduciaries, presumption of invalidity arising from transactions not rebutted when no evidence was presented showing that decedent received independent advice); Voss v. Stewart, 420 So. 2d 761, 765 (Miss. 1982) (claimant not entitled to shop pursuant to owner's agreement to devise shop when owner devised shop to others and claimant failed to prove irrevocability of agreement; claimant's services to owner were ordinary rather than unique, and services had been compensated); Deposit Guar. Nat'l Bank v. Cotten, 420 So. 2d 242, 245 (Miss. 1982) (although 1979 will, allegedly revoking 1961 will, was destroyed before testatrix died, testimony concerning existence of 1979 will and contents admissible); Johnson v. Collins, 419 So. 2d 1029, 1031 (Miss. 1982) (inter vivos transfer of certificates of deposit from decedent husband to wife not voluntary act with gift intent but was conditioned upon obtaining divorce, which never occurred because of husband's death); Maxwell v. Yuncker, 419 So. 2d 580, 581-83 (Miss. 1982) (statutes requiring claims against estate be registered, probated, and allowed 90 days after first publication of notice to creditors, and requiring clerk to endorse petition that claim was probated, allowed, and registered, not applicable to inchoate and contingent claim by decedent's adopted son involving ownership by co-tenancy of specific property); Turner v. Estate of Hightower, 417 So. 2d 919, 922-23 (Miss. 1982) (real property interest insufficient standing to petition for decree modification closing estate when interest contingent upon outcome of will contest); Rives v. Rives, 416 So. 2d 653, 656 (Miss. 1982) (administrator of estate has fiduciary duty to resist appeal from divorce awarded to deceased who died during course of appeal, when will showed deceased intended estate to pursue appeal); Gettis v. McAllister, 411 So. 2d 770, 771-72 (Miss. 1982) (wife's renunciation of husband's will effective and valid, even though made before will admitted to probate); *In re* Will of Griffin, 411 So. 2d 766, 769-70 (Miss. 1982) (devise of property to nieces and nephews "in equal shares, per stirpes and not per capita," applied

cellaneous topics.[7] Three of the court's decisions on adoption and termination of parental rights will be treated textually. In addition, the Mississippi Legislature's adoption of the Uniform Child Custody Jurisdiction Act and amendment of the statute providing for mineral leasing of state-owned lands will be discussed textually.

I. Parental Objection to Adoption

In *Ainsworth v. Natural Father,*[8] the Mississippi Supreme Court determined the extent to which a 1980 amendment to section 93-17-7 of the Mississippi Code[9] changed the area of law concerning parental

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only to substituted legatees, not named devisees).

[5] *See infra* notes 124-49 and accompanying text.

[6] Brown v. Blue Cross & Blue Shield, No. 53, 536 slip op. at 3-4 (Miss. Dec. 1, 1982) (cause of action arose when insured relied on policy subsequently cancelled without notification); A. Copeland Enter. v. Pickett & Meador, Inc., 422 So. 2d 752, 754 (Miss. 1982) (in absence of contract, additional insured not liable when named insured fails to pay premiums); Mississippi Ins. Underwriting Ass'n v. Maenza, 413 So. 2d 1384, 1385 (Miss. 1982) (premium mailed two days prior to due date kept insurance in force regardless when premium payment received by insurer); Pittman v. Home Indem. Co., 411 So. 2d 87, 90 (Miss. 1982) (insured requested individual automobile coverage from agent subsequent to separation from spouse, but agent failed to effect coverage because insured's payments were applied to spouse's policy, insurer deemed to have knowledge of information acquired by agent while transacting business); Consolidated Am. Life Ins. Co. v. Toche, 410 So. 2d 1303, 1304-05 (Miss. 1982) (punitive damages not allowed for failure of insurer to initially pay benefits absent showing of aggression, insult, malice, or gross negligence); Bonds v. Bonds, 409 So. 2d 704, 706 (Miss. 1982) (statute exempting proceeds of policy from debts of insured not applicable to exempt cash surrender value of policy from garnishment to satisfy child support and alimony decree).

[7] Fouche v. Ragland, 424 So. 2d 559 *passim* (Miss. 1982) (county supervisor election unsuccessfully challenged on procedural grounds).

[8] 414 So. 2d 417 (Miss. 1982).

[9] Miss. Code Ann. § 93-17-7 (Supp. 1982) provides in its entirety:

> No infant shall be adopted to any person if either parent, after having been summoned to sign the petition for adoption, shall appear and object thereto before the making of a decree for adoption, unless it shall be made to appear to the court from evidence touching such matters that the parent so objecting had abandoned or deserted such infant or is mentally, or morally, or otherwise unfit to rear and train it, including, but not limited to, being within any of the grounds requiring termination of parental rights as set forth in subsections (2) and 3(a), (b), (d) or (e) of section 93-15-103 in either of which cases the adoption may be decreed notwithstanding the objection of such parent, first considering the welfare of the child, or children, sought to be adopted. Provided, however, the parents shall not be summoned in the adoption proceedings nor have the right to object thereto if the parental rights of the parent or parents have been terminated by the procedure set forth in sections 93-15-101 through 93-15-111, and such termination shall be res judicata on the

objection to adoption proceedings.[10] In *Ainsworth*, a husband and wife

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question of parental abandonment or unfitness in the adoption proceedings.

[10] The addition of the factors set forth in section 93-15-103 of the Mississippi Code to section 93-17-7, and the resulting change to section 93-17-7, was the focus of the court's concern. 414 So. 2d at 418. MISS. CODE ANN. § 93-15-103 (Supp. 1982) provides in its entirety:

> (1) When a child has been removed from the home of its natural parents and cannot be returned to the home of his natural parents within a reasonable length of time because returning to the home would be damaging to the child or the parent is unable or unwilling to care for the child, and when adoption is in the best interest of the child, taking into account whether the adoption is needed to secure a stable placement for the child and the strength of the child's bonds to his natural parents and the effect of future contacts between them, the grounds listed in subsections (2) and (3) of this section shall be considered as grounds for the termination of parental rights. The grounds may apply singly or in combination in any given case.
>
> (2) The rights of a parent with reference to a child, including parental rights to control or withhold consent to an adoption, and the right to receive notice of a hearing on a petition for adoption, may be relinquished and the relationship of the parent and child terminated by the execution of a written voluntary release, signed by the parent, regardless of the age of the parent.
>
> (3) Grounds for termination of parental rights shall be based on one or more of the following factors:
>
> (a) A parent has deserted without means of identification or abandoned and made no contact with a child under the age of three (3) for six (6) months or a child three (3) years of age or older for period of one (1) year; or
>
> (b) A parent has been responsible for a series of abusive incidents concerning one or more children; or
>
> (c) When the child has been in the care and custody of a licensed child caring agency for a least one (1) year, that agency has made diligent efforts to develop and implement a plan for return of the child to its parents; and:
>
> (i) The parent has failed to exercise reasonable available visitation with the child; or
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> (ii) The parent, having agreed to a plan to effect placement of the child with the parent, fails to implement the plan so that the child caring agency is unable to return the child to said parent; or
>
> (d) The parent exhibits ongoing behavior which would make it impossible to return the child to the parent's care and custody:
>
> (i) Because the parent has a diagnosable condition unlikely to change within a reasonable time such as alcohol or drug addiction, severe mental deficiencies or mental illness, or extreme physical incapacitation, which condition makes the parent unable to assume minimally, acceptable care of the child; or
>
> (ii) Because the parent fails to eliminate behavior, identifed by the child caring agency or the court, which prevents placement of said child with the parent in spite of diligent efforts of the child caring agency to assist the parent; or
>
> (e) When there is an extreme and deep-seated antipathy by the child toward the parent or when there is some other substantial erosion of the relationship between the parent and child which was caused at least in part by the

petitioned the chancery court to allow the husband to adopt the wife's child of a former marriage. The wife's former husband, the natural father of the child, objected to the adoption.

The facts presented at trial showed that the natural father had defaulted on child support payments,[11] which had been mandated by the divorce decree,[12] and also had not seen the child in three and one-half years.[13] Although the natural father had not made a reasonable effort to see the child or to provide for the child's welfare,[14] the chancellor ruled that because he had neither abandoned nor deserted the child within the meaning of section 93-17-7, his objection would bar the adoption.[15] In addition, the chancellor held that the 1980 amendment to section 93-17-7 had no effect on the case.[16] On appeal, the Mississippi Supreme Court reversed.[17]

Under section 93-17-7 of the Mississippi Code, an infant may not be adopted if either natural parent objects. But if the court finds that the objecting parent abandoned or deserted the child, or that this parent is mentally, morally, or otherwise unfit to raise the child,[18] the adoption may be decreed despite this parent's objection.[19] In 1980, section 93-17-7 was amended[20] to include, as a separate basis for prohibiting a parent from objecting to an adoption, the grounds set forth in

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parent's serious neglect, abuse, prolonged and unreasonable absence, unreasonable failure to visit or communicate, or prolonged imprisonment.

(4) Legal custody and guardianship by persons other than the parent as well as other permanent alternatives which end the supervision by the department of public welfare should be considered as alternatives to the termination of parental rights, and these alternatives should be selected when, in the best interest of the child, parental contacts are desirable and it is possible to secure such placement without termination of parental rights.

[11] The father had not contributed to the child's support since April 1977, allegedly because he had encountered financial difficulties and because he did not know where to mail the money after the mother remarried and moved from her former address. Evidence revealed, however, that the father had repaid the $15,000 he had borrowed to open a clothing store and had accumulated an inventory valued at $50,000. 414 So. 2d at 418.

[12] The divorce was decreed in January 1976, when the child was six months old. *Id.*

[13] The last time the father visited the child was sometime in 1976, when the child was about thirteen months old. *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id. § 93-17-7 was amended effective July 1, 1980. This case was filed August 20, 1980, and was tried under the amended statute. 414 So. 2d at 419.*

[17] 414 So. 2d at 421.

[18] In the instant case, there was no issue concerning the father's mental or moral fitness. *Id.* at 419.

[19] Miss. Code Ann. § 93-17-7 (Supp. 1982).

[20] Act of May 9, 1980, ch. 485, § 6, 1980 Miss. Laws 1019, 1021-22.

section 93-15-103.[21]

In *Ainsworth*, the Mississippi Supreme Court discussed two provisions of section 93-15-103. One ground for termination of parental rights found under 93-15-103(3)(a) arises when a parent has either "deserted without means of identification or abandoned and made no contact with a child under the age of three (3) for six (6) months or a child three (3) years of age or older for a period of one (1) year."[22] The other ground discussed by the court, provided in 93-15-103(3)(e), occurs when the child extremely dislikes the parent, or when the relationship between the two has seriously eroded, partly because of the parent's own neglect or abuse, the parent's continued absence, the parent's failure to communicate, or the parent's imprisonment.[23] If either of these provisions of section 93-15-103 applies, a chancellor may allow an adoption notwithstanding an objection by a parent.

The majority[24] in *Ainsworth* made a crucial distinction between the terms "abandonment" and "desertion," reasoning that the legislature intended such a contrast by the use of the disjunctive "or" in the language of section 93-17-3.[25] The court determined that abandonment indicates a parent's intent to relinquish all parental rights or claims and that desertion evidences an avoidance of duties or obligations.[26]

The court held that because the natural father had shown complete disregard for the welfare of his child for more than three and one-half years and had failed to pay child support, his actions amounted to desertion of the child.[27] As a result, the father forfeited his parental rights even though he may not have intended to relinquish them.[28] Furthermore, the majority, referring to section 93-15-103(3)(e), determined that the father's neglect of the child caused a substantial erosion of the parental relationship.[29] Because section 93-17-7 requires

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[21] Specifically, the amendment to § 93-17-7 included the grounds for parental rights termination as set forth in § 93-5-103(2)-(3)(a)-(b), (d)-(e).

[22] MISS. CODE ANN. § 93-15-103(3)(a) (Supp. 1982).

[23] *Id.* § 93-15-103(3)(e).

[24] Justice Darden wrote the opinion for the court. 414 So. 2d at 418.

[25] *Id.* at 419. The court noted that neither the statute itself nor previous decisions aided in determining the distinction between "abandonment" and "desertion." *Id.*

[26] *Id.* at 419-20; *see* Wright v. Fitzgibbons, 198 Miss. 471, 477-78, 21 So. 2d 709, 710 (1945) ("abandonment" defined as parent's relinquishment of parental claims and avoidance of parental duties).

[27] 414 So. 2d at 420.

[28] *Id.*

[29] *Id.* Notwithstanding the possibility that a good parental relationship existed until the child reached 13 months of age, the court concluded that subsequent to this time, the relationship had dissolved to the point that the child actually thought of his mother's

a consideration of whether the child's welfare will be promoted by the proposed adoption,[30] the case was reversed and remanded for determination of that issue.[31]

Justice Roy Noble Lee dissented,[32] arguing that section 93-15-103(3)(a), now incorporated into Mississippi adoption law by section 93-17-7, did not change the established law requiring abandonment or desertion before a child can be adopted over the objection of a parent.[33] In addition, Justice Lee concluded that the distinction between the terms "abandonment" and "desertion" was unwarranted because the result of either act would be the same, and for all practical purposes the two terms have identical meanings.[34] Noting that the chancellor had determined after hearing conflicting evidence that the father had not abandoned his child, Justice Lee argued that proof of abandonment or desertion beyond a reasonable doubt should be required before a parent could be barred from objecting to the adoption of his own child.[35]

In a separate dissent, Justice Dan Lee[36] contended that the majority's opinion contradicted the court's previous decision in *Miller v. Arrington*,[37] which was decided eight weeks before *Ainsworth*,[38] thus creating disarray in this area of law.[39] In *Miller*, the natural father had objected to the adoption of his daughter by his former wife and her

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new husband as his father. *Id.*

[30] *See* MISS. CODE ANN. § 93-17-7 (Supp. 1982). Because the chancellor sustained the father's objection to the adoption, the issue of considering the child's welfare upon adoption was never reached by the lower court. 414 So. 2d at 420.

[31] 414 So. 2d at 421.

[32] Justices Bowling and Dan Lee joined this dissent. *Id.*

[33] *Id.* Justice Roy Noble Lee noted that the langauge in § 93-15-103(3)(a), providing that a parent forfeits his parental rights if he has "abandoned and made no contact with" a child for six months, if less than three years old, or one year, if at least three years old, is ultimately meaningless, because "as many explanations and excuses may be made to the reason for no contact within such short periods as there are broken homes." *Id.*

[34] 414 So. 2d at 421.

[35] *Id.* See Natural Father v. United Methodist Children's Home, 418 So. 2d 807 (Miss. 1982), *see infra* notes 50-80 and accompanying text, in which the court held that the "preponderance of the evidence" standard of proof for termination of parental rights proceedings found in § 93-15-109 was unconstitutional, and that future proceedings of this nature must utilize to a "clear and convincing" standard of proof. 418 So.2d at 811.

[36] Justice Bowling also joined in Justice Dan Lee's dissent. 414 So. 2d at 422.

[37] 412 So. 2d 1175 (Miss. 1982).

[38] *Ainsworth* was rendered on May 26, 1982; *Miller v. Arrington* was decided on March 31, 1982.

[39] 414 So. 2d at 423.

new husband. The divorce decree enjoined the father from "bothering or molesting" either his former wife or their child.[40] No child support payments were ever made by the father voluntarily; rather, any payments made were compelled by contempt proceedings.[41] Although the father had not seen the child since 1973, when she was one year old, testimony showed the mother never intended to allow the father visitation rights.[42]

Reversing the chancellor's ruling that the father had abandoned and deserted the child,[43] the *Miller* court declared that the 1980 amendment to section 93-17-7 supplemented rather than altered the existing requirements of the earlier statute[44] concerning abandonment and desertion.[45] After reviewing the record from the trial court, the supreme court simply held that there was no evidence that the father had evinced a *settled purpose* to renounce all parental duties and relinquish all parental claims to the child.[46]

In contrast with the *Ainsworth* majority, Justice Lee contended that *Miller* and *Ainsworth* could not be distinguished.[47] He argued that the court in *Miller* had in effect held that there must be a settled purpose or intention to relinquish parental rights; only two months later, the same court held that parental rights may be terminated notwithstanding the lack of a settled purpose or intention.[48] Criticizing

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[40] 412 So. 2d at 1176.

[41] *Id.* Some of the constant arrearages in child support payments were explained by the father's inability to pay following injuries sustained in an automobile accident. *Id.* at 1178.

[42] *Id.* at 1176-77. In the court's opinion, the mandate of the divorce decree and the mother's exclusive custody of the child had been interpreted by both the mother and father as denying the father any visitation rights. *Id.* at 1176.

[43] The chancellor found that "the absolute failure of this father to pay any money over the long period of time constitutes abandonment and desertion." *Id.* at 1178.

[44] MISS. CODE ANN. § 1269-03 (1942) (current version at MISS. CODE ANN. § 93-17-5 (1972)).

[45] 412 So. 2d at 1178. Earlier interpretations of the statute by the supreme court required either abandonment or desertion of a child, or mental or moral unfitness of the objecting parent before an adoption would be granted. *See, e.g.*, Yarber v. Dearman, 341 So. 2d 108, 110 (Miss. 1977); Ford v. Litton, 211 So. 2d 871, 873 (Miss. 1968); Mayfield v. Braund, 217 Miss. 514, 521, 64 So. 2d 713, 715 (1953).

[46] 412 So. 2d at 1178. The court observed that there was no evidence of abandonment other than the father's constant arrearages in child support payments. *Id.*

[47] 414 So. 2d at 423. The majority found the two cases distinguishable because *Miller* neither considered the question of desertion nor addressed the effect of § 93-15-103(3)(e) on overcoming a parent's objection to an adoption. *Id.* at 420.

[48] *Id.* at 422-23. Justice Lee also cited Yarber v. Dearman, 341 So. 2d 108, 109 (Miss. 1977), to reiterate earlier decisions holding that abandonment imports any conduct on the part of the parent that evinces a settled purpose to forego all parental duties and

the court's contradictory holdings, the dissent warned that this inconsistency would confuse chancellors, who must follow the supreme court's rulings.[49]

II. Termination of Parental Rights

In another important 1982 decision, *Natural Father v. United Methodist Children's Home*,[50] the Mississippi Supreme Court was faced with the question whether the "preponderance of the evidence" standard of proof established by the legislature in section 93-15-109 of the Mississippi Code, which authorizes the termination of parental rights of an unfit parent, satisfies the standards of due process required by the fourteenth amendment to the United States Constitution.

Earlier Mississippi Supreme Court decisions had declared that the state legislature has the authority to create laws governing the termination of parental rights.[51] In 1980, the Mississippi Legislature passed the Termination of Rights of Unfit Parents Act,[52] which repealed the existing statutory law concerning parental rights termination. Under the 1980 Act, as provided by section 93-15-109 of the Mississippi Code, the standard of proof required for the termination of parental rights was "by a preponderance of the evidence."[53] The immediate predecessor of this statute, section 93-15-7, did not set forth a standard of proof.[54]

Recently, the United States Supreme Court has placed certain

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relinquish all parental claims to the child. 414 So. 2d at 422; *see* Hall v. Hall, 202 So. 2d 641, 642 (Miss. 1967); Wright v. Fitzgibbons, 198 Miss. 471, 477-78, 21 So. 2d 709, 710 (1945).

[49] 414 So. 2d at 423.

[50] 418 So. 2d 807 (Miss. 1982).

[51] *See, e.g.*, Eggleston v. Landrum, 210 Miss. 645, 651, 50 So. 2d 364, 366 (1951) (in best interest of child, state "transcends" rights of natural parent and can take child from unfit parents); Reynolds v. Davidow, 200 Miss. 480, 484-85, 27 So. 2d 691, 692 (1946) (state assumes parent's responsibilities when parent abandons child or becomes unfit).

[52] Act of May 9, 1980, ch. 485, 1980 Miss. Laws 1019 (repealing Miss. Code Ann. §§ 93-15-1 to -11 (1972)) (codified at Miss. Code Ann. §§ 93-5-101 to -111 (Supp. 1982)).

[53] Miss. Code Ann. § 93-15-109 (Supp. 1982) provides:

> After hearing all the evidence in regard to such petition, if the chancellor is satisfied by a preponderance of the evidence that the parent or parents are within the grounds requiring termination of parental rights as set forth in this chapter, then the court may terminate all the parental rights of the parent or parents regarding the child, and terminate the right of the child to inherit from such parent or parents. The termination of the parental rights of one (1) parent may be made without affecting the parental rights of the other parent, should circumstances and evidence ever so warrant.

[54] *Id.* § 93-15-7 (1972).

limitations upon the state's power to legislate the termination of parental rights. In a 1982 case, *Santosky v. Kramer*,[55] the Supreme Court reviewed the constitutionality of the New York statutes on parental custody termination. Under New York law,[56] the state could terminate, over parental objection, the rights of parents in their child upon a finding by a "fair preponderance of the evidence" that the child was "permanently neglected."[57]

In *Santosky*, a neglect proceeding had been initiated in family court to terminate the rights of a mother and father in their three children.[58] Applying the "fair preponderance of the evidence" standard, the family court found permanent neglect on the parents' part and ruled that their parental rights should be terminated.[59] After the New York Court of Appeals dismissed the parents' appeal, the United States Supreme Court granted certiorari to consider the parents' constitutional challenge to the "fair preponderance of the evidence" standard.[60]

The Supreme Court reasoned that the fundamental right of natural parents in the care, custody, and management of their children is protected by the fourteenth amendment, and, therefore, the state must provide parents with fundamentally fair procedures in proceedings for the termination of parental rights.[61] Following its previous decision in *Lassiter v. Department of Social Services*,[62] the Court found that the

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[55] 455 U.S. 745 (1982).

[56] N.Y. Soc. Serv. Law § 384-b.4.(d) (McKinney Supp. 1982-1983) provides, "An order committing the guardianship and custody of a child pursuant to this section shall be granted only upon one or more of the following grounds . . . (d) the child is a permanently neglected child."

N.Y. Fam. Ct. Act § 622 (McKinney Supp. 1981-1982) establishes the requisite standard of proof: "When used in this part, 'fact-finding hearing' means in the case of a petition permanently to terminate custody a hearing to determine whether the allegations . . . are supported by a fair preponderance of the evidence."

[57] 455 U.S. at 747.

[58] *Id.* at 751. The neglect proceeding was brought by the Commissioner of the County Department of Social Services after receiving information about incidents of parental neglect. *Id.*

[59] *Id.* In its ruling, the family court rejected the parents' constitutional challenge to the "fair preponderance" standard. *Id.*

[60] *Id.* at 750-51.

[61] *Id.* at 753.

[62] 452 U.S. 18 (1981). In *Lassiter*, the Court ruled that due process does not require the appointment of counsel for indigent parents in every parental rights termination proceeding. *Id.* at 33. In reaching this conclusion, the majority, *id.* at 27, and three of the dissenters, *id.* at 59, agreed that the nature of the process due in a termination proceeding is to be determined by balancing the three factors enumerated in Mathews v. El-

nature of the process required in these proceedings turned on a balancing of the factors set forth in *Mathews v. Eldridge*.[63] These factors are (1) the private interest that will be affected by the proceeding, (2) the risk of erroneous deprivation of such interest created by the state procedure, and (3) the state's interest supporting the use of such procedures.[64]

After balancing these three factors, the Court held that in a termination of parental rights proceeding, the process required to satisfy the fourteenth amendment necessitates a "clear and convincing" standard of proof as opposed to a "fair preponderance of the evidence" standard.[65] A standard based on clear and convincing evidence would adequately convey to the fact finder "the level of subjective certainty about his factual conclusions" needed to satisfy due process.[66] The

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dridge, 424 U.S. 319 (1976).

[63] 424 U.S. 319 (1976). In *Mathews*, a disabled worker, whose disability benefits had been terminated, challenged the constitutionality of the administrative procedures for assessing whether a continuing disability exists as set forth in the disability insurance benefits program of the Social Security Act. Under these procedures, a state agency makes a continuing assessment of the worker's eligibility for benefits, and its final determination is reviewed by the Social Security Administration (SSA), which notifies the worker of the termination of his benefits. The SSA also notifies the worker of his right to a reconsideration by the state agency and to an evidentiary hearing before an SSA administrative law judge. *Id.* at 319-24.

In upholding the constitutionality of the administrative procedures, the Supreme Court ruled that an evidentiary hearing is not required prior to termination of the disability payments and that the procedures prescribed under the Act complied with due process standards. *Id.* at 349. The Court, reemphasizing that due process is a flexible rather than technical and fixed concept, determined that a resolution of the due process issue would require consideration of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

[64] 455 U.S. at 754.

[65] *Id.* at 768-70. The Court concluded, after balancing these three factors, that the "fair preponderance" standard prescribed by New York law violated the due process clause of the fourteenth amendment. *Id.* at 768. In reaching this conclusion, the Court determined that a preponderance standard does not fairly allocate the risk of erroneous fact finding between the state and the natural parents. Use of this a standard might indicate that society deems the termination of parental rights to be of no more importance than the erroneous failure to terminate those rights. This standard of proof, therefore, would not properly reflect the relative harshness of these two outcomes. *Id.* at 766.

[66] *Id.* at 769.

Court specifically left to the states the determination of the "precise burden equal to or greater than" the *Santosky* standard.[67]

In *Natural Father v. United Methodist Children's Home*[68] the Mississippi Supreme Court relied on *Santosky* in deciding whether Mississippi's "preponderance" standard of proof was constitutional. In *United Methodist Children's Home,* the father had placed his twin sons in the United Methodist Children's Home (UMCH) because he was unemployed and having financial difficulties.[69] Soon afterward, the twins were placed with a foster family. While living with their foster parents, the twins displayed extremely hostile and vulgar behavior.[70] A psychologist employed by the foster parents to evaluate and to treat the twins later testified that the twins had been victims of sexual abuse in the home of their natural parents.[71] The twins were subsequently returned to their natural mother's custody; within a few weeks she returned to UMCH and relinquished custody of her sons to the children's home for adoption.[72] The twins' father objected to the adoption, and UMCH filed, and was granted, a petition seeking the termination of the father's parental rights.[73]

In accordance with the United States Supreme Court's decision in *Santosky,*[74] the Mississippi Supreme Court held on appeal that the "preponderance of the evidence" standard of proof set forth in section 93-15-109 of the Mississippi Code was unconstitutional.[75] The court declared that under *Santosky* the standard of proof in any termination of parental rights proceeding must be "clear and convincing,"[76] and re-

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[67] *Id.* at 769-70.

[68] 418 So. 2d at 807 (Miss. 1982).

[69] *Id.* at 808. The mother and father of the twins were divorced in 1978. Although the mother was granted legal custody, she surrendered custody to the father, who kept the twins until they were placed in the UMCH in 1980. *Id.* at 807-08.

[70] At the hearing before the chancellor, both foster parents testified about the twins' behavior while living with the foster family. According to both witnesses, the twins frequently used obscenities, sexually suggestive vulgarities, and also related stories of their natural father sexually abusing them. *Id.* at 808.

[71] *Id.* The psychologist testified that although the mention of their natural father brought about no real response from the twins, the mention of returning to their mother at home caused "extreme agitation" on their part. He also was of the opinion that the natural father actually cared for the twins, because the father had come by his office to inquire about their well-being. *Id.*

[72] *Id.*

[73] *Id.*

[74] *See supra* notes 55-67 and accompanying text.

[75] 418 So. 2d at 811. The court noted that in all other aspects the operation and application of § 93-15-109 would be unaffected. *Id.*

[76] *Id.* at 811. The court noted that it had "required" a clear and convincing standard

versed and remanded the case.[77]

By requiring the heightened standard of proof of "clear and convincing" evidence, the supreme court has placed Mississippi with the majority of states concerning parental rights termination proceedings. As was observed by the Supreme Court in *Santosky*,[78] fourteen states had already required "clear and convincing" evidence, or its equivalent, by statutory law,[79] and sixteen other states, the District of Columbia, and the Virgin Islands had called for such a standard of proof by judicial decision.[80]

III. Uniform Child Custody Jurisdiction Act

An important change occurred in Mississippi's domestic relations law with the legislature's adoption of the Uniform Child Custody Jurisdiction Act (UCCJA).[81] The enactment of UCCJA was recommended by the National Conference of Commissioners on Uniform State Laws in 1968 after the Commissioners had studied the problems involved in the enforcement of custody decrees and had concluded that parental

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of proof in Doe v. Attorney W., 410 So. 2d 1312 (Miss. 1982), which was decided five months earlier. 418 So. 2d at 811.

In *Doe v. Attorney W.*, the court upheld the termination of a father's rights to his illegitimate infant daughter based on § 93-15-1, which did not provide for any standard of proof. 410 So. 2d at 1317. The facts showed the father had not offered the child's mother any support or financial assistance during her pregnancy and child-birth and that he had indicated a desire to relinquish all parental claims to the child. *Id.* at 1316-17. "Clear and convincing" testimony also established the father was "morally unfit" because he was married to another woman at the time the child was conceived and born. *Id.* at 1317. The chancellor's finding of abandonment was affirmed, but it is noteworthy that the supreme court held that the father had abandoned an *unborn* child. *Id.* at 1316-17.

In De La Oliva v. Lowndes County Dept. of Pub. Welfare, 423 So. 2d 1328, 1331 (Miss. 1982), the Mississippi Supreme Court reaffirmed its mandate requiring at least "clear and convincing" evidence to terminate parental rights.

[77] 418 So. 2d at 811.

[78] 455 U.S. at 749 n.3.

[79] *Id.* Those 14 states are Alaska, California, Georgia, Iowa, Maine, Michigan, Missouri, New Mexico, North Carolina, Rhode Island, Tennessee, Virginia, West Virginia, and Wisconsin. *Id.*

[80] *Id.* Those states that have required a "clear and convincing" standard by case law are Alabama, Arkansas, Florida, Illinois, Kansas, Minnesota, Montana, Nebraska, New Jersey, North Dakota, Oklahoma, Pennsylvania, Texas, Utah, Washington, and Wyoming. Additionally, two other states, New Hampshire and Louisiana, require proof beyond a reasonable doubt. *Id.*

[81] Act of March 25, 1982, ch. 414, 1982 Miss. Laws 370 (codified at Miss. Code Ann. §§ 93-23-1 to -47 (Supp. 1982)). The Mississippi Legislature adopted the uniform act in its entirety, with the exception of § 1, which listed the general purposes of the Act.

kidnapping had become an escalating national problem.[82] While investigating parental kidnapping, the Commissioners discovered that the "rule of seize and run" had become widespread throughout the country, that state courts were willingly altering custody orders made in other states, and that "interstate children," the real victims of custody battles, were without stable homes because of the limitations in existing state custody laws. There was an urgent need for a uniform act to alleviate these problems.[83] Although response by state legislatures to the UCCJA was initially slow, an increasing number of states adopted it after recognizing the importance of a cooperative effort.[84] By July of 1981, only Mississippi, Massachusetts, and the District of Columbia had not adopted the uniform legislation.[85] Mississippi's UCCJA was enacted March 25, 1982, and took effect July 1, 1982.[86]

The UCCJA seeks to minimize jurisdictional conflict between courts of different states on child custody matters and to ensure that these matters are litigated in the state with which the child and the child's family have the most substantial connection. The best interests of the child are furthered by limiting modification of custody orders to the court that has access to the most information about the child.[87] The late Professor Bridgitte Bodenheimer, Reporter for the Special Committee of the Commissioners on Uniform State Laws that drafted the UCCJA,[88] explained the basic manner in which the general purposes are achieved under the UCCJA.

> The basic scheme of the Act is simple. First, one court in the country assumes full responsibility for custody of a particular child. Second, for this purpose a court is selected which has access to as much relevant information about the child and family in the state as possible. Third, other essential evidence,

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[82] *See* Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1216-18 (1969).

[83] *Id.* at 1216-17.

[84] Moran, *The Uniform Child Custody Jurisdiction Act: An Analysis of its History, a Prediction of its Future*, 84 W. VA. L. REV. 135, 146 (1981). Only North Dakota had adopted the UCCJA by the end of 1969, but by 1978 twenty-two more states had enacted the uniform legislation. *Id.*

[85] *Id.* at 156 n.83. Not all of the states that have enacted UCCJA legislation have adopted the entire Act. Texas and Kentucky, for example, have simply adopted equivalent state statutes. *See* KY. REV. STAT. §§ 403.260 to -.350 (Supp. 1976); TEX. FAM. CODE ANN. tit. 2, §§ 11.01 to -.20 (Vernon 1980-1981).

[86] Act of March 25, 1982, ch. 414, § 25, 1982 Miss. Laws 376.

[87] UNIF. CHILD CUSTODY JURISDICTION ACT § 1, 9 U.L.A. 116-17 (1979).

[88] Bodenheimer, *supra* note 82, at 1207.

> which is inevitably out-of-state in the case of an interstate child, is channelled into the first court which might be called the "custody court." Fourth, other states abide by the decision of the custody court and enforce it in their territory, if necessary. Fifth, adjustments in visitation and other ancillary provisions of the decree, and custody changes, if any, are as a rule made by the original custody court. Sixth, if the child and his family no longer have appreciable ties with the state of the original court, a new custody court is selected to take the place of the original one for purposes of adjustments and modifications, and pertinent information is channelled from the prior to the subsequent custody court.[89]

The basic jurisdictional unit of the UCCJA is the "home state," which essentially is the last place where the child lived with a parent for at least six months.[90] The UCCJA grants jurisdiction to the "home state" court even though the child has been removed from that state. If the custodial parent remains in the "home state," the UCCJA provides a six-month period after the child is removed during which the court in the "home state" retains jurisdiction.[91] The drafters of the UCCJA included this six-month extension to protect the home-state parent from having to follow the parent that removed the child to a foreign jurisdiction; consequently, if the home-state parent acts promptly, he may

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[89] *Id.* at 1218.

[90] MISS. CODE ANN. § 93-23-3(f) (Supp. 1982), defines "home state" as follows:

> (f) "Home state" means the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least six (6) consecutive months, and in the case of a child less than six (6) months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six-month or other period; . . .

According to the National Conference of Commissioners on Uniform State Laws, the six-month period was chosen to provide a definite test based on the assumption that most children are integrated into a community after living there for six months. UNIF. CHILD CUSTODY JURISDICTION ACT § 3 commissioners' note, 9 U.L.A. 123 (1979).

[91] *See* MISS. CODE ANN. § 93-23-5(1)(a) (Supp. 1982), which provides:

> (1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
>
> (a) This state (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six (6) months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state.

initiate an action in a local court.[92]

Some children may not have a "home state" as defined in section 93-23-3(f). Section 93-23-5(1)(b), therefore, provides for an alternative "significant connection" test, which requires substantial involvement of the child and at least one parent with the state.[93] The use of this section is conditioned upon an availability in the state of "substantial evidence" regarding the child's care, protection, training, and personal relationships.[94]

The UCCJA includes a special jurisdictional provision for a child living in the state that has either been abandoned or subjected to mistreatment or abuse by the custodial parent.[95] This provision, however, is intended to cover only those situations in which immediate protection for the child is required.[96] When it appears that no other state has jurisdiction or that another state has declined to exercise jurisdiction, the UCCJA provides that jurisdiction may be established on the grounds it is in the child's best interests.[97]

Under section 93-23-11, Mississippi courts are prohibited from initiating custody proceedings if a proceeding concerning the custody of the same child is pending in a court of another state.[98] In this regard, the UCCJA mandates that a state court take affirmative steps to ensure that concurrent proceedings are not pending in another state.[99]

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[92] UNIF. CHILD CUSTODY JURISDICTION ACT § 3 commissioners' note, 9 U.L.A. 123 (1979).

[93] MISS. CODE ANN. § 93-23-5(1)(b) (Supp. 1982).

[94] *Id.*

[95] *Id.* § 93-23-5(1)(c).

[96] UNIF. CHILD CUSTODY JURISDICTION ACT § 3 commissioners' note, 9 U.L.A. 124 (1979). The commissioners have stressed that "[w]hen there is child neglect without emergency or abandonment, jurisdiction cannot be based on this paragraph." *Id.*

[97] MISS. CODE ANN. § 93-23-5(1)(d) (Supp. 1982).

[98] *Id.* § 93-23-11(1).

[99] *Id.* § 93-23-11(2)-(3) provides as follows:

> (2) Before hearing the petition in a custody proceeding the court shall examine the pleadings and other information supplied by the parties under section 93-23-17 and shall consult the child custody registry established under section 93-23-31 concerning the pendency of proceedings with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state it shall direct an inquiry to the state court administrator or other appropriate official of the other state.
>
> (3) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction, it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with sections 93-23-37 through 93-23-43. If a court

For this to work successfully communication between the administrators of both Mississippi's courts and other states' courts is essential.

Section 93-23-15 codifies the "clean hands" doctrine.[100] Under this section, a court must decline to exercise jurisdiction if the petitioner has improperly removed the child from another state or has engaged in some other objectionable conduct to gain or to retain custody of the child in violation of a decree. But the drafters of the UCCJA note, "In the case of illegal removal or retention refusal of jurisdiction is mandatory unless the harm done to the child by a denial of jurisdiction outweighs the parental misconduct."[101] If a court dismisses a petition under section 93-23-15, the party initiating the proceedings may be charged with the expenses incurred by the party defending the petition.[102]

A Mississippi court may decline to exercise jurisdiction if it would be an inconvenient forum and if another state would provide a more proper forum.[103] If the court declined jurisdiction, it has discretion to

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of this state has made a custody decree before being informed of a pending proceeding in a court of another state, it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction, it shall likewise inform the other court to the end that the issues may be litigated in the more appropriate forum.

[100] MISS. CODE ANN. § 93-23-15 (Supp. 1982) states as follows:

(1) If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline to exercise jurisdiction if this is just and proper under the circumstances.

(2) Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state the court may decline to exercise its jurisdiction if this is just and proper under the circumstances.

(3) In appropriate cases a court dismissing a petition under this section may charge the petitioner with necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses.

Subsection (1) of 93-23-15 applies to cases in which a custody decree has not yet been rendered in any state. UNIF. CHILD CUSTODY JURISDICTION ACT § 8 commissioners' note, 9 U.L.A. 143 (1979). Subsection (2) applies only when the court has power to modify the decree of another state. *Id.*

[101] UNIF. CHILD CUSTODY JURISDICTION ACT § 8 commissioners' note, 9 U.L.A. 143 (1979).

[102] MISS. CODE ANN. § 93-23-15(3) (Supp. 1982).

[103] *Id.* § 93-23-13(1).

dismiss the proceedings and direct the case to the appropriate forum.[104] Additionally, if the court concludes that it is clearly an improper forum, the petitioner may be required to pay all expenses.[105]

The UCCJA, through several of its provisions, attempts to involve all necessary parties to a child custody modification. Section 93-23-17 requires that a petition for custody modification contain all available information concerning the places where the child has lived for the preceding five years and any contact between the child and the parties claiming custody rights, along with any information about prior custody proceedings involving the child.[106] A court may order all interested parties to be joined in the action[107] and may require them to appear before the court.[108] If a party has custody of the child, the court can order that this party appear before the court with the child.[109]

Under standards of due process, reasonable notice and an opportunity to be heard must be given to the contestants, to any parent whose

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[104] *Id.* § 93-23-13(5).

[105] *Id.* § 93-23-13(7).

[106] *Id.* § 93-23-17. The drafters determined that it would be important for a court to receive this information as soon as possible to determine its jurisdiction, the joinder of any additional parties, and also for the purpose of discovering courts of other states that may need to be contacted under other provisions of the UCCJA. UNIF. CHILD CUSTODY JURISDICTION ACT § 9 commissioners' note, 9 U.L.A. 146 (1979).

[107] MISS. CODE ANN. § 93-23-19 (Supp. 1982) provides:

> If the court learns from information furnished by the parties pursuant to section 93-23-17 or from other sources that a person not a party to the custody proceeding has physical custody of the child or claims to have custody or visitation rights with respect to the child, it shall order that person to be joined as a party and to be duly notified of the pendency of the proceeding and of his joinder as a party. If the person joined as a party is outside this state he shall be served with process or otherwise notified in accordance with section 93-23-9.

[108] *Id.* § 93-23-21(1). This section states:

> (1) The court may order any party to the proceeding who is in this state to appear personally before the court. If that party has physical custody of the child the court may order that he appear personally with the child.
>
> (2) If a party to the proceeding whose presence is desired by the court is outside this state with or without the child the court may order that the notice given under section 93-23-9 include a statement directing that party to appear personally with or without the child and declaring that failure to appear may result in a decision adverse to that party.
>
> (3) If a party to the proceeding who is outside this state is directed to appear under subsection (2) of this section or desires to appear personally before the court with or without the child, the court may require another party to pay to the clerk of the court travel and other necessary expenses of the party so appearing and of the child if this is just and proper under the circumstances.

[109] *Id.*

parental rights have not been terminated, and to anyone who has custody of the child.[110] For a person outside Mississippi, notice must be given "in the manner, time and form as provided by law for service of process."[111]

A custody decree entered by a court that had jurisdiction under the UCCJA and followed all UCCJA notice requirements is binding on all parties who are given proper notice and an opportunity to be heard.[112] The custody determination, however, may be modified pursuant to the provisions of the UCCJA.[113]

Under sections 93-23-25 and 93-23-29, Mississippi courts must recognize and enforce the terms of a custody decree of another state.[114] These sections are the key provisions that guarantee increased stability

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[110] *Id.* § 93-23-7. This section further provides that if any of these persons listed are outside Mississippi, notice and an opportunity to be heard must be given pursuant to § 93-23-9.

The commissioners' notes warn that strict complicance with §§ 93-23-7 and 93-23-9 is essential for a custody decree to be valid within the state and enforceable in other states. UNIF. CHILD CUSTODY JURISDICTION ACT § 4 commissioners' note, 9 U.L.A. 130 (1979).

[111] MISS. CODE ANN. § 93-23-9(1) (Supp. 1982). This section also provides that notice will not be required if the person submits to the jurisdiction of the court. *Id.* § 93-23-9(2). *See generally* MISS. CODE ANN. § 13-3-19 (1972) for provisions concerning summons on nonresidents.

[112] MISS. CODE ANN. § 93-23-23 (Supp. 1982).

[113] *Id.* A custody decree is always subject to modification in the best interest of the child and, therefore, has no absolute finality. *See* Hodge v. Hodge, 186 So. 2d 748, 750, *suggestion of error overruled,* 188 So. 2d 240 (Miss. 1966). However, as long as the decree has not been modified it is binding as a final judgment. *See* UNIF. CHILD CUSTODY JURISDICTION ACT § 12 commissioners' note, 9 U.L.A. 150 (1979).

[114] MISS. CODE ANN. § 93-23-25 (Supp. 1982) provides:

> The courts of this state shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this chapter or which was made under factual circumstances meeting the jurisdictional standards of the chapter, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this chapter.

Section 93-23-29 states:

> (1) A certified copy of a custody decree of another state may be filed in the office of the clerk of the court of this state. The clerk shall treat the decree in the same manner as a custody decree of the court of this state. A custody decree so filed has the same effect and shall be enforced in like manner as a custody decree rendered by a court of this state.
>
> (2) A person violating a custody decree of another state which makes it necessary to enforce the decree in this state may be required to pay necessary travel and other expenses, including attorneys' fees, incurred by the party entitled to the custody or his witnesses.

for the "interstate child." Additionally, section 93-23-27 provides that there can be no modification by a Mississippi court of the terms of another state court's custody order unless it appears the court of original jurisdiction can no longer exercise its authority and the Mississippi court has jurisdiction.[115]

The UCCJA requires the party initiating the proceedings to inform the court under oath of the child's present address, the places where the child has lived for the last five years, and the names of those who have had actual custody of the child during this time period.[116] The petitioner must also provide the court with other relevant information, such as the history of the custody litigation.[117]

Under sections 93-23-29 and 93-23-31, certified copies of custody decrees and certain communications concerning custody proceedings from other states may constitute a registry of custody orders to be maintained in the offices of the clerks of Mississippi courts.[118] The purpose of this registry is to collect, in one designated place, all relevant information concerning out-of-state custody proceedings that reaches

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[115] MISS. CODE ANN. § 93-23-27 (Supp. 1982). For an illustration of this point, the commissioners' notes to the UCCJA offer this hypothetical situation in which the court of original jurisdiction must give up its jurisdiction:

> For example, if custody was awarded to the father in state 1 where he continued to live with the children for two years and thereafter his wife kept the children in state 2 for 6½ months (3½ months beyond her visitation privileges) with or without permission of the husband, state 1 has preferred jurisdiction to modify the decree despite the fact that state 2 has in the meantime become the "home state" of the child. If, however, the father also moved away from state 1, that state loses modification jurisdiction interstate, whether or not its jurisdiction continues under local law. . . . Also, if the father in the same case continued to live in state 1, but let his wife keep the children for several years without asserting his custody rights and without visits of the children in state 1, modification jurisdiction of state 1 would cease.

UNIF. CHILD CUSTODY JURISDICTION ACT § 14 commissioners' note, 9 U.L.A. 154 (1979).

[116] MISS. CODE ANN. § 93-23-17 (Supp. 1982); *see supra* text accompanying note 106.

[117] MISS. CODE ANN. § 93-23-17 (Supp. 1982).

[118] *Id.* §§ 93-23-29 to -31. Section 93-23-29 states that a certified copy of a custody decree from another state may be filed in the office of the clerk of a Mississippi court. A decree so filed will have the same effect as one rendered by a Mississippi court. If the violation of another state's custody decree necessitates such decree to be enforced in Mississippi, the party in violation may be forced to pay all expenses of the party entitled to custody.

Section 93-23-31 provides for a registry of custody decrees in which the clerk of each court must file certified copies of custody decrees from other states. The clerk must also file any communications concerning custody proceedings pending in other states, findings of inconvenient forum by courts of other states, or custody proceedings in other states that may affect the jurisdiction of a Mississippi court.

the court.[119] The registry, however, will usually be incomplete because it will include only those documents that were specially requested or were otherwise obtained by the clerk's office.[120]

Mississippi courts must now affirmatively seek any available court records of the custody decree under attack before determining whether to exercise jurisdiction. Before hearing a petition, a court must examine all information provided by the parties and must also review the child custody registry maintained in the office of the clerk.[121] The court may also exchange information with a court of another state to ensure that jurisdiction will be exercised by the appropriate court.[122] Also, upon discovery that a custody decree has been rendered in another state regarding a child presently involved in custody litigation before the Mississippi court, the Mississippi court must request a certified copy of the transcript of any record from the foreign court.[123]

IV. Mineral Leasing of State-Owned Lands

During 1982, the Mississippi Supreme Court decided twenty-four cases pertaining to property law.[124] Although two of these decisions

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[119] Unif. Child Custody Jurisdiction Act § 16 commissioners' notes, 9 U.L.A. 160 (1979).

[120] *Id.*

[121] Miss. Code Ann. § 93-23-11(2) (Supp. 1982); *see supra* notes 116-19 and accompanying text.

[122] Miss. Code Ann. § 93-23-13(4) (Supp. 1982).

[123] *Id.* § 93-23-43.

[124] Smith v. Mississippi State Highway Comm'n, 423 So. 2d 808, 812-16 (Miss. 1982) (no reversible error in exclusion of testimony and photographs; instructions precluding jury from considering inconvenience as separate item of damages; allowing jury to visit property without judge and court reporter present); Barber v. Turney, 423 So. 2d 133, 135-36 (Miss. 1982) (county board of education not bound by percentage of fair market sale or rental value of sixteenth section land in determining annual rental assessment); Dunaway v. W.H. Hoopper & Assocs., 422 So. 2d 749, 751 (Miss. 1982) (res judicata or collateral estoppel only operates to preclude relitigation when subject matter, cause of action, parties, and quality or character of party against whom claim made are substantially identical); Wright v. City of Jackson, 421 So. 2d 1219, 1221-22 (Miss. 1982) (res judicata inapplicable when zoning board hears petitions to rezone same property to different classifications; public need for rezoning must be proved by clear and convincing evidence); Times Square Realty, Inc. v. City of Grenada, 421 So. 2d 1053, 1055 (Miss. 1982) (averaging two separate and distinct approaches to value in eminent domain cases is reversible error); Terracina Motor Co. v. Sarullo, 419 So. 2d 1335, 1337 (Miss. 1982) (lessor has option to recover either statutory or reasonable rent for holdovers); Ayers v. Petro, 419 So. 2d 177, 178 (Miss. 1982) (statutory damages for unsuccessful appeal not recoverable in partition suit); Trapp v. Tidwell, 418 So. 2d 786, 792 (Miss. 1982) (dragnet clause in deed of trust did not attach to unliquidated claim or tort resulting from grantor's embezzlement); Stepanek v. Roth, 418 So. 2d 74, 76 (Miss. 1982) (estoppel bars

marked significant developments in Mississippi law, they have already received sufficient commentary and, therefore, will not be treated textually.[125] The Mississippi Legislature's enactment of an amendment to the statutes concerning mineral leasing and development of state-owned lands will be discussed textually.

Section 29-7-3 of the Mississippi Code, which controls oil, gas, and mineral leasing of state-owned lands, was substantially amended during the 1982 session of the Mississippi Legislature.[126] The amended statute attempts to clarify ambiguities resulting from the vague language in the former statute.[127]

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enforcement of restrictive covenant when party waits three years to institute action); Turner v. Estate of Hightower, 417 So. 2d 919, 923 (Miss. 1982) (contract for purchase of land from devisee of invalid will does not confer standing to file direct action in estate proceeding); Ayers v. Petro, 417 So. 2d 912, 915-16 (Miss. 1982) (conveyance to husband and wife as joint tenants does not create tenancy by entireties); Black v. Williams, 417 So. 2d 911, 912 (Miss. 1982) (owners of fee beneath "artificial," or "man-made" lakes, have exclusive control over water above respective portions, absent statute, covenant, or agreement to the contrary); City of New Albany v. Ray, 417 So. 2d 550, 552-53 (Miss. 1982) (zoning decisions by mayor and Board of Aldermen not disturbed unless arbitrary, capricious, discriminatory, or beyond legal authority); Graham v. Pugh, 417 So. 2d 536, 540 (Miss. 1982) (tenant's authority to contract with materialman subjects owner to materialmen's lien); Rushing v. Rushing, 414 So. 2d 429, 431 (Miss. 1982) (divorce settlement granting ex-wife exclusive possession of jointly owned property prohibits partition); Pittman v. Currie, 414 So. 2d 423, 427-28 (Miss. 1982) (testimony sufficient to declare tax sale void; statute of limitations does not run on void tax sale where purchaser does not take possession); Morgan v. Sauls, 413 So. 2d 370, 374 (Miss. 1982) (fraudulent conveyances set aside enabling judgment creditors to attach; upheld conveyences executed prior to incident creating tort action); Bell v. City of Canton, 412 So. 2d 1179, 1181 (Miss. 1982) (zoning decisions upheld if supported by substantial evidence); Hall v. Panola Cnty. Bank, 412 So. 2d 238, 240 (Miss. 1982) (deed of trust takes priority over judgment creditors up to statutory homestead exemption); Trustees of Wade Baptist Church v. Mississippi State Highway Comm'n, 411 So. 2d 761, 763 (Miss. 1982) (qualifications of expert sufficient to establish value in eminent domain proceedings); Central Grain & Supply Co. v. Jesco, Inc., 410 So. 2d 879, 881 (Miss. 1982) (one-year statute of limitation to file materialmen's lien); Pittman v. Simmons, 408 So. 2d 1384, 1387 (Miss. 1982) (averments of continuous use sufficient to raise adverse possession defense although party mistakenly claimed property under color of title).

[125] The two significant decisions that will not be treated textually are Cappaert v. Junker, 413 So. 2d 378, 382 (Miss. 1982) (exculpatory clauses covering common areas in residential leases void as against public policy), *noted in* 52 MISS. L.J. 913 (1982) and Bear Creek Water Ass'n v. Town of Madison, 416 So. 2d 399, 402 (Miss. 1982) (factors admissible for valuation of "going concern" in eminent domain proceedings), *noted in* 52 MISS. L.J. 927 (1982).

[126] Act of April 15, 1982, ch. 455, §§ 1-2, 1982 Miss. Gen. Acts No. 10 at 19 (codified as amended at MISS. CODE ANN. §§ 29-7-3, 29-7-17 (Supp. 1982)).

[127] *See generally* Richey, *A Comparison of Oil and Gas Leasing Authorities in the Gulf of Mexico (States of Alabama, Mississippi, and Louisiana, and the Federal Gov-*

Prior to the 1982 amendments, the Mississippi Commission on Natural Resources[128] had authority to execute oil, gas, and mineral leases on behalf of the state, covering all state-owned property.[129] The grant, however, specifically excluded sixteenth section school lands,[130] lieu lands, and forfeited tax lands subject to redemption. The statute provided that the Commission could set the terms and conditions of mineral leases as it deemed "just and proper,"[131] subject to a maximum permissible royalty stipulation.[132] In addition, the Commission was authorized under the statute to conduct a survey of the territorial waters of the state[133] for the purpose of leasing submerged lands for mineral

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ernment), and the Jurisdictional Conflict Over the Boundary Between State and Federal Authority in the Gulf of Mexico, 40 MISS. L.J. 351, 357-58 (1969) (authority under mineral leasing statute expressed in very general terms).

[128] MISS. CODE ANN. § 29-7-1 (Supp. 1982). Prior to July 1, 1979, the state mineral lease commission, composed of the governor, the attorney general, the state land commissioner, the treasurer, and the state oil and gas supervisor, was authorized to execute leases on behalf of the state. *Id.* § 29-7-1 (1972).

[129] *Id.* § 29-7-3 (1972). Before the enactment of section 29-7-3, lessees often attempted to lease state-owned property directly from the department or agency that controlled the use of the property. For example, in Stokely v. State *ex rel.* Knox, 149 Miss. 435, 115 So. 563 (1928), an oil and gas lease was executed by the trustees of the state mental hospital under their power to "have charge of the interests of the asylum, and manage and direct its affairs." *Id.* at 446, 115 So. at 566. The court concluded that absent express legislative authority to convey land, the board of trustees was without authority to execute mineral leases. *Id.* at 447, 115 So. at 566.

Despite section 29-7-3, oil, gas, and mineral leasing of state-owned lands has continued on an ad hoc basis. Under the language of the former statute, the commission was "authorized and empowered . . . to lease any and all of the state land now owned . . . or hereafter acquired." MISS. CODE ANN. § 29-7-3 (1972). The exclusiveness of the commission's authority was never challenged in the courts and remained open to question until the 1982 amendments. *See infra* notes 133, 136, and accompanying text.

[130] Sixteenth section and lieu lands may be leased from the county board of education by competitive bids only. MISS. CODE ANN. § 29-3-99 (Supp. 1982). For a discussion of the rights and duties conferred by mineral leases of sixteenth section school lands, see Pace v. State *ex rel.* Rice, 191 Miss. 780, 4 So. 2d 270 (1941).

[131] MISS. CODE ANN. § 29-7-3 (1972); *see* Richey, *supra* note 127, at 361 (terms and conditions largely discretionary with commission).

[132] MISS. CODE ANN. § 29-7-3 (1972) provides in relevant part:

> Whenever any such land or property is leased for oil and gas and/or other minerals, such lease contract shall not be for more than seven eighths of such oil and gas and of other minerals, retaining therein and thereof at least the net one eighth royalty to the state, same to be paid in the manner prescribed by the commission.

[133] The United States Supreme Court concluded that Mississippi is not entitled to rights in submerged lands lying beyond three geographical miles from its coast. United States v. Louisiana, 363 U.S. 1, 82 (1960). But the Court declined to express an opinion on the exact location of Mississippi's coastline. *Id.* at 82 n.135. *See generally* Richey,

development.[134]

The new amendments have clarified the process of leasing state-owned property. The new statute clearly provides that a mineral lease from the Commission is required before oil, gas, or other minerals may be developed or extracted from state-owned lands.[135] Under the amended statute, the Commission was granted the authority to promulgate rules and regulations governing all aspects of leasing state land under its jurisdiction.[136] The leases, however, must reserve a royalty of at least three-sixteenths to the state.[137]

The new statute requires that permits be obtained from the Commission[138] before any seismographic or other testing activities may be conducted on state-owned lands.[139] The Commission will also possess the authority to promulgate regulations controlling mineral exploration and testing, including the establishment of a fee system for the issuance of permits.[140] Although permits were not required under the earlier statute, these provisions are in accord with common law con-

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supra note 127, at 371-80 (conflict over boundaries in the Gulf of Mexico).

[134] MISS. CODE ANN. § 29-7-3 (1972) (amended 1982).

[135] *Id.* (Supp. 1982). "*There shall be no development* or extraction of oil, gas, or other minerals from state-owned lands . . . without first obtaining a mineral lease . . . from the commission on natural resources." *Id.* (emphasis added).

The Commission is empowered to lease to any "reputable person, association or company." *Id.* (1972 & Supp. 1982); *cf.* FLA. STAT. ANN. § 253.51 (West 1975) (any person, firm, corporation, or association authorized to do business in Florida). The amended statute continues to except sixteenth section lands, lieu lands, and all lands subject to redemption. *See supra* note 7 and accompanying text.

[136] MISS. CODE ANN. § 29-7-3 (Supp. 1982). The commission on natural resources continues to enjoy wide discretionary powers over the setting of any necessary fees, delay rental payments, shut-in royalties, or other provisions as may be required. *Id.*

Significantly, the legislature declined to require some form of competitive bidding procedure for leasing state-owned lands. Competitive bidding is currently required in Mississippi for leasing school lands. *See id.* § 29-3-99. Furthermore, most of Mississippi's neighboring states require some form of competitive bidding. *See, e.g.*, ALA. CODE § 9-17-65 (1975); FLA. STAT. ANN. §§ 253.53, 253.54 (West 1975); LA. REV. STAT. ANN. § 30.126 (West Supp. 1982). For a comparison of prior Mississippi, Alabama, and Louisiana leasing law, see Richey, *supra* note 127, at 356-66.

[137] MISS. CODE ANN. § 29-7-3 (Supp. 1982); *see supra* note 132 and accompanying text.

[138] Testing on state-owned wildlife management areas, lakes, and fish hatcheries is also subject to rules and regulations promulgated by the commission on wildlife conservation, which also receives fees for testing activities. MISS. CODE ANN. § 29-7-3 (Supp. 1982). Furthermore, the department of wildlife conservation shall review each permit within the Mississippi Sound or tidelands and provide special conditions in the permits as it deems necessary. *Id.*

[139] *Id.*

[140] *Id.*; *see supra* notes 131, 135, and accompanying text.

cepts.[141] In addition, the data obtained from any mineral exploration activity must be disclosed to the Commission upon demand;[142] but it will remain confidential for a period of ten years from the date of receipt.[143]

Finally, the provisions of section 29-7-3, including all rules, regulations, orders, permits, and leases issued under its authority, will be enforced by civil and criminal penalties.[144] A civil penalty of not more than ten thousand dollars for each violation may be assessed by the Commission after notice and hearing.[145] Also, the Commission has the authority to obtain injunctive relief from a court of competent jurisdiction to enforce the provisions of the mineral leasing statute or any rules or regulations adopted pursuant to its authority.[146] Under subsection 3, the statute provides that when any violation causes the death of fish, shellfish, or other wildlife, the responsible party shall be liable for the costs reasonably necessary to restock the waters or replenish the wildlife.[147] Likewise, when operations cause damage to or destruction of state-owned property, the operator may be liable for the cost of remedial or cleanup actions in addition to other penalties.[148] Finally, any

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[141] *See generally* Hawkins, *The Geophysical Trespasser and Negligent Geophysical Explorer*, 29 TEX. L. REV. 310, 314-17 (1951) (remedies for geophysical trespass).

[142] *Cf.* FLA. STAT. ANN. § 253.511 (West 1975) (lessees must file annual notarized report of operations with state or lose lease; work product, trade secrets, or methods of operation not required to be disclosed).

[143] MISS. CODE ANN. § 29-7-3 (Supp. 1982). The statute provides that the information received shall not be disclosed to "the public or to any firm, individual or agency other than officials or authorized employees of the state." *Id.* Any person who makes an unauthorized disclosure of any information obtained under this statute may be convicted of a misdemeanor, subject to a fine of not more than $5,000 or imprisonment in the county jail for not more than one year, or both. *Id.*

[144] *Id.* § 29-7-17.

[145] Each day a violation occurs is considered a separate and additional violation. *Id.* § 29-7-17(1).

[146] *Id.* § 29-7-17(2). The statute provides that the Commission may obtain an injunction *without* showing that: (1) irreparable damage would result; (2) there is no adequate remedy at law; or (3) a written complaint or order was issued for the violation. *Id.*

[147] *Id.* § 29-7-17(3).

[148] *Id.* § 29-7-17(4). This provision grants remedies not available under the common law rule that damages to the surface are measured by the diminution of value before and after the wrongful conduct. *See* 1 H. WILLIAMS & C. MEYERS, OIL & GAS LAW, § 217 (1981). Mississippi generally has held that the "before and after rule," the difference between the fair market value of the property before and after the injury, would apply in cases of surface damage. *See, e.g.*, Haisch v. Southaven Land Co., 274 F. Supp. 392, 400 (N.D. Miss. 1967) (diminution of value rule applied); Ginther v. Long, 227 Miss. 885, 892, 87 So. 2d 286, 288 (1956) (same). *But see* System Fuels, Inc. v. Barnes, 363 So. 2d 747, 749 (Miss. 1978) (cost of restoration appropriate when cost is less than diminution of

violator of section 29-7-3, or any rules promulgated under its authority, may be subject to criminal prosecution.[149]

In conclusion, the new leasing statute should establish a durable standard for oil and gas leasing of state-owned lands. But, until the Mississippi Commission on Natural Resources adopts a comprehensive set of regulations or guidelines, leasing state lands will remain an uncertain process.

Marcial D. Forester, Jr.
William C. Brabec

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value).

[149] MISS. CODE ANN. § 29-7-17(5) (Supp. 1982). Upon conviction, the violator will be fined not less than $500 nor more than $5,000 for each offense. *Id.* Each day the violation occurs constitutes a separate offense. *Id.*

RECENT DECISIONS

Insurance-Automobile Liability Coverage-Exclusion is Unenforceable to the Extent That It Denies Minimum Coverage Required by the Safety Responsibility Act

In a Mississippi-based diversity action, plaintiff insurer[1] sought a declaratory judgment[2] in the United States District Court for the Northern District of Mississippi claiming that defendant insurer[3] had primary liability coverage for losses arising from an automobile accident involving a car owned by defendant's policyholder.[4] Plaintiff al-

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[1] The plaintiff, Universal Underwriters Insurance Company (Universal), was the general liability insurer of the Cliff Colbert Chevrolet-Oldsmobile dealership and its partners. An employee of the dealership was involved in an accident while driving a customer's car in the course of his employment. The accident was a result of the employee's negligence. The driver of the other car was seriously injured and a passenger was killed. Both the employee and the dealership were named defendants in suits filed in state court by the driver of the other car for her own personal injuries and as the sole heir of the deceased passenger. The suits demanded actual and punitive damages in excess of one million dollars. Universal had retained attorneys to monitor the litigation in state court. Universal Underwriters Ins. Co. v. American Motorists Ins. Co., 541 F. Supp. 755, 756-57 (N.D. Miss. 1982).

[2] The federal declaratory action was filed after suits were instituted in state court. When a compromise of the state court damage suits was reached, Universal and the defendant each contributed to the settlement pursuant to an agreement that the rights of each in the declaratory action would not be prejudiced or affected by the settlement. *Id.* at 757.

[3] The defendant, American Motorists Insurance Company (American), had issued an automobile liability policy to the owner of the car that was being driven by Colbert's employee when the accident occurred. At her husband's direction, the owner's wife had given her consent for the car to be driven by Colbert's employee to the dealership's garage for servicing and repair. A collision occurred while the employee was driving the car to the garage. *Id.* at 756-57.

[4] *Id.* at 756. American's policy obligated it to pay on behalf of the insured any sums that the insured might be legally liable to pay, within policy limits, as a result of death or personal injuries arising out of the ownership, maintenance, and use of the automobile. The policy also required American to defend suits in which the damages sought were payable under the terms of the policy. *Id.* at 757. The purpose of such coverage was to protect the insured from liability to third persons. A standard automobile policy may contain other coverage in addition to the liability coverage, but the liability coverage

leged that the driver was an additional insured under the omnibus clause of defendant's policy, which extended coverage to persons other than the named insured.[5] It further alleged that the exclusion[6] asserted by defendant to deny coverage was in conflict with the omnibus clause as defined in the Mississippi Motor Vehicle Safety Responsibility Act[7] and was thereby nullified.[8] Defendant counterclaimed, asserting that the automobile business exclusion was valid under Mississippi law,[9]

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extends only to claims based on injuries to third parties. 12 G. COUCH, R. ANDERSON & M. RHODES, COUCH ON INSURANCE 2d § 45.3 (1981)[hereinafter cited as COUCH].

[5] 541 F. Supp. at 756-57. The omnibus clause in American's policy defined the insured as follows:

> (1) the named insured and any resident of the same household, (2) any other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other use thereof is within the scope of such permission, and (3) any other person or organization but only with respect to his or its liability because of acts or omissions of an insured under . . . (1) or (2) above.

Id. at 758. A number of commentators have discussed the various features of omnibus clauses. *See* 12A COUCH, *supra* note 4, §§ 45:291-45:479 (dicussion of omnibus clause cases); Cohen, *Automobile Liability Insurance: Public Policy and the Omnibus Clause in New Jersey*, 15 RUTGERS L. REV. 155, 155-76 (1961) (criticism of both the New Jersey courts' treatment of the omnibus clause and the clause itself).

[6] American's policy excluded coverage "to an owned automobile while used by any person while such person is employed or otherwise engaged in the automobile business." 541 F. Supp. at 758. It defined "automobile business" as "the business or occupation of selling, repairing, servicing, storing or parking automobiles." *Id.* This type of exclusion has generally been upheld as a valid limitation of coverage. *See* 12A COUCH, *supra* note 4, § 45:993 (collection of cases). *But see* Nationwide Mut. Ins. Co. v. Walter, 290 Pa. Super. 129, 434 A.2d 164, 166-67 (1981) (automobile business exclusion valid under Pennsylvania law but invalid under New Jersey law).

[7] MISS. CODE ANN. § 63-15-43(2)(b) (1972) provides as follows:

> (2) Such owner's policy of liability insurance:
>
> (b) shall pay on behalf of the insured named therein and any other person, as insured, using such motor vehicle or motor vehicles with the express or implied permission of such named insured, all sums which the insured shall become legally obligated to pay as damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles . . . subject to limits exclusive of interest and costs, with respect to each such motor vehicle, as follows: ten thousand dollars ($10,000.00) because of bodily injury to or death of one (1) person in any one (1) accident and, subject to said limit for one (1) person, twenty thousand dollars ($20,000.00) because of bodily injury to or death of two (2) or more persons in any one (1) accident, and five thousand dollars ($5,000.00) because of injury to or destruction of property of others in any one (1) accident.

[8] 541 F. Supp. at 758-59.

[9] While it was agreed that there was no exact Mississippi precedent, the defendant relied primarily on the state supreme court's decision in Ramsey v. Price, 249 Miss. 192,

that the plaintiff had primary coverage as the liability insurer of the driver's employer,[10] and that the plaintiff owed defendant money expended in settlement with claimants as well as other expenses.[11] Alternatively, the defendant urged that if the exclusion was nullified under the terms of the Safety Responsibility Act,[12] the exclusion should nevertheless be unaffected by the Act to the extent that the policy was written in excess of the statutorily required minimum coverage.[13] The United States District Court, *held*, dismissed with prejudice. All automobile liability insurance policies must comply with the Mississippi Safety Responsibility Act, and any exclusion of permissive drivers not specified by the Act[14] is unenforceable to the extent of the coverage

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161 So. 2d 778 (1964). 541 F. Supp. at 759, 761. The *Ramsey* court had held that when a vehicle is in the charge of a service business and is driven by an employee of the business to or from the business premises for servicing, the employee is an agent of his employer and, consequently, the employer rather than the vehicle owner is responsible for any negligent acts committed by the employee while driving the vehicle. 249 Miss. at 193, 161 So. 2d at 779.

[10] 541 F. Supp. at 756-57. The liability policy issued by Universal to the driver's employer, Cliff Colbert, provided coverage for bodily injury on behalf of any insured, defining "insured" in the following manner:

> (a) any partner or paid employee . . . of the named insured or such partner or paid employee . . . while using an automobile covered by this coverage part or when legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission, and (b) any person or organization legally responsible for the use thereof while such automobile is physically operated by the named insured or any such partner or paid employee . . . provided the actual use of the automobile is by the named insured or with his permission.

Id. at 758.

[11] *Id.* at 757. American had contributed $19,500 to the settlement in addition to expending $21,417 for legal fees and $1,113 for court costs and related expenses in defense of the state litigation. Universal had contributed $103,500 to the settlement and had retained attorneys to monitor the state court litigation. *Id.*

[12] For the text of MISS. CODE ANN. § 63-15-43(2)(b) (Supp. 1982), see *supra* note 7.

[13] 541 F. Supp. at 759. MISS. CODE ANN. § 63-15-43(7) (Supp. 1982) provides as follows:

> (7) Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy, and such excess or additional coverage shall not be subject to the provisions of this chapter. With respect to a policy which grants such excess or additional coverage, the term "motor vehicle liability policy" shall apply only to that part of the coverage which is required by this section.

[14] MISS. CODE ANN. § 63-15-43(5) (Supp. 1982) provides:

> (5) Such motor vehicle liability policy shall not insure:
>
> (a) any obligation for which the insured or any company as his insurer may be held liable under any workmen's compensation law;

required by the Act. *Universal Underwriters Insurance Co. v. American Motorists Insurance Co.*, 541 F. Supp. 755, 760-62 (N.D. Miss. 1982).

The problem of compensating victims of traffic accidents has been the subject of public concern for over fifty years.[15] Uncompensated loss to a victim typically occurs when the party legally at fault in an accident is financially unable to satisfy a subsequent judgment.[16] Drivers themselves have partially solved this problem by voluntarily obtaining automobile liability insurance as protection against liability.[17] This insurance guarantees compensation to third parties that are injured in any accident covered by the insured driver's liability policy.[18] Although a vast majority of American motorists are covered by liability insurance,[19] the number of uninsured motorists remains a significant matter of public concern.[20]

(b) any liability on account of bodily injury to or death of any employee of the insured while engaged in the employment, other than domestic, of the insured, or in domestic employment if benefits therefor are either payable or required to be provided under any workmen's compensation law; or

(c) any liability because of injury to or destruction of property owned by, rented to, in charge of or transported by the insured.

[15] *See* Laufer, *Insurance Against Lack of Insurance? A Dissent from the Uninsured Motorist Endorsement*, 1969 DUKE L.J. 227, 230-31 (discussion of early responses to the problem of uninsured motorists).

[16] In order to become legally entitled to compensation from another driver, the victim of an accident generally must prove that the other driver violated the rules of reasonable conduct. *See* Spangenberg, *No-Fault Fact, Fiction, and Fallacy*, 44 MISS. L.J. 15, 17 (1973). The fact that a driver is uninsured or otherwise judgment-proof may discourage an injured motorist from even attempting to obtain an adjudication of legal liability. *See* Comment, *A Survey of Financial Responsibility Laws and Compensation of Traffic Victims: A Proposal for Reform*, 21 VAND. L. REV. 1050, 1052 (1968).

[17] In 1969, an estimated 85% of the passenger automobiles in the United States were covered by liability insurance. Laufer, *supra* note 15, at 227. In 1982, it was estimated that only 70% of the vehicles in Mississippi were covered by liability insurance. Telephone interview with Bob Gibson, Rating Commissioner for the Mississippi Insurance Commission (Jan. 6, 1982).

[18] *See* Spangenberg, *supra* note 16, at 16-17. Liability insurance is often referred to as third-party insurance, but its purpose is to protect the policyholder, rather than the victim. *Id.*; *see also* Benton v. Canal Ins. Co., 241 Miss. 493, 507, 130 So. 2d 840, 846 (1961) (purpose of liability policy is to benefit policyholder).

[19] *See supra* note 17 and accompanying text.

[20] *See* Vaughn v. State Farm Mut. Auto. Ins. Co., 359 So. 2d 339, 343 (Miss. 1978) (Bowling, J., dissenting) (goal of modern law is to make sure that as many vehicles as possible are covered by liability insurance); Travelers Indem. Co. v. Watkins, 209 So. 2d 630, 634 (Miss. 1968) (taking judicial notice that numerous cars are driven by uninsured motorists).

In response to this concern, state regulation[21] of liability insurance has developed in a variety of forms. Regulation of rates prevents unreasonable charges by insurers and indirectly encourages drivers to purchase liability insurance.[22] In addition to regulation of rates and general regulatory provisions,[23] other laws have been passed that more directly affect the number of insured drivers. Compulsory insurance,[24] no-fault insurance,[25] and safety responsibility laws[26] are the most prevalent legislative schemes designed to directly control automobile liability insurance. In addition, uninsured motorist coverage laws have been enacted in many states to allow drivers to insure against uncompen-

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[21] State regulation has generally been without interference of federal law. The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1976) prevents any federal encroachment on state regulation of insurance by federal legislation other than that specifically relating to the insurance business. Recent proposals in Congress, however, have set forth minimum standards of no-fault coverage. *See* 12A COUCH, *supra* note 4, § 45:661 n.10. *See generally* Magnuson, *Nationwide No-Fault* 44 MISS. L.J. 132, 132-57 (1973) (discussion of need for uniform mandatory no-fault legislation).

[22] *See, e.g.*, COLO. REV. STAT. § 10-4-401 (1973 & Supp. 1982); DEL. CODE ANN. tit. 18 § 2503 (1974 & Supp. 1982); GA. CODE ANN. § 33-9-4 (1982); MISS. CODE ANN. § 83-3-101 (1972); N.H. REV. STAT. ANN. § 412:15 (1968); N.J. REV. STAT. § 17:29A-4 (1970 & Supp. 1982).

[23] *See, e.g.*, MISS. CODE ANN. §§ 83-3-101 to -129 (1972 & Supp. 1982) (casualty insurance rates); *id.* §§ 83-5-1 to -85 (1972 & Supp. 1982) (general provisions relative to insurance and insurance companies); *id.* §§ 83-6-1 to -43 (1972 & Supp. 1982) (registration and examination of insurers); *id.* §§ 83-11-1 to -21 (1972 & Supp. 1982) (cancellation or nonrenewal of policy); *id.* §§ 83-11-101 to -111 (1972 & Supp. 1982) (uninsured motorist coverage); *id.* §§ 83-11-201 to -247 (1972 & Supp. 1982) (automobile club services).

[24] States with compulsory liability insurance statutes require motorists to carry liability insurance before they can operate a motor vehicle on the public highways. By 1981, 27 states had enacted compulsory insurance statutes. 12A COUCH, *supra* note 4, § 45:679 at 314 & n.20; *see, e.g.*, COL. REV. STAT. § 10-4-705 (1973 & Supp. 1982); GA. CODE ANN. § 33-34-4 (1982); MASS. GEN. LAWS ANN. ch. 175, § 113A (1972 & Supp. 1982); N.J. REV. STAT. § 39:6A-3 (1970 & Supp. 1982); N.Y. VEH. & TRAF. LAW § 312 (McKinney 1970 & Supp. 1982).

[25] No-fault insurance statutes have been enacted to allow traffic accident victims to be compensated without regard to fault. In the absence of a no-fault insurance statute, tort law traditionally requires a showing of fault as a condition of compensation. In contrast to liability insurance, no-fault insurance is usually first-party insurance with benefits payable directly to the injured person from his insurer. *See* Keeton, *The Case for No-Fault Insurance*, 44 MISS. L. J. 1, 1-8 (1973). In 1981, no-fault insurance statutes were in force in 22 states. 12A COUCH, *supra* note 4, § 45:661 n.7; *see, e.g.*, COL. REV. STAT. § 10-4-704 to -723 (1973 & Supp. 1982); MASS. GEN. LAWS ANN. ch. 90, § 34A (1969 & Supp. 1982); N.C. GEN. STAT. § 20-309 (1978); N.J. REV. STAT. § 39:6A-1 (1970 & Supp. 1982); N.Y. INS. LAW § 670-678 (McKinney Supp. 1982).

[26] In contrast to compulsory insurance, safety responsibility laws require delayed and selective rather than immediate and universal compulsion to insure against liability. *See* Laufer, *supra* note 15, at 231-32.

sated loss from injury caused by unknown or uninsured motorists.[27]

Although most states, including Mississippi, have now adopted several of the above mentioned laws,[28] safety responsibility laws were the first comprehensive legislative response to public concern for assuring compensation to traffic accident victims.[29] Safety responsibility laws were designed primarily for three purposes: (1) to prevent or decrease accidents through identification and elimination of bad drivers,(2) to increase the proportion of insured drivers or vehicles and to require bad drivers to insure, and (3) to secure payment of claims related to automobile accidents.[30] Mississippi's safety responsibility law will be used for purposes of illustration in this note because the provisions of the Mississippi Act are substantially similar to the safety responsibility laws in effect in most states.[31]

To further the purposes stated above, the Mississippi law requires

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[27] *Id.* at 235. This coverage was available as early as 1925 under the name of "unsatisfied judgment" insurance, but a majority of states now statutorily require that uninsured motorist coverage be written into all automobile insurance policies. *Id.; see, e.g.,* ALA. CODE § 32-7-23 (1977); MASS. GEN. LAWS ANN. ch. 175, § 113L (1972 & Supp. 1982); N.C. GEN. STAT. 20-279.21(b) (1978); TEX. REV. CIV. STAT. ANN. art. 5.06-1 (Vernon 1981).

Mississippi's Uninsured Motorist Coverage Act, codified at MISS. CODE ANN. §§ 83-11-101 to -111 (1972 & Supp. 1982), differs somewhat from the laws in most other states because uninsured motorist coverage can be waived if the insured party rejects the coverage in writing. *Id.* § 83-11-101 (Supp. 1982).

[28] *See, e.g.,* MISS. CODE ANN. §§ 63-15-1 to -75 (1972 & Supp. 1982) (safety responsibility law); *id.* §§ 83-11-101 to -111 (uninsured motorist law). *See generally* DIGEST OF MOTOR LAWS (1977) (noting the laws affecting liability insurance in each state).

[29] 12A COUCH, *supra* note 4, § 45:721. Massachusetts enacted a financial responsibility law in 1925, but this law, unlike the safety responsibility laws later enacted by other states, required *all* motorists to show proof of liability insurance or other evidence of ability to satisfy a judgment as a condition of motor vehicle registration. *See* Kesler v. Department of Pub. Safety, 369 U.S. 153, 159 (1961). Several uniform financial responsibility laws with compulsory features have been proposed, *id.* at 159-66, but only the Model Act that appears in Chapter 7 of the Uniform Vehicle Code of 1956 has been widely adopted. *Id.* at 164-65 & n.28. This Act requires only those persons involved in certain accidents or convicted of certain violations to deposit security or show proof of financial responsibility. *Id.* at 165.

[30] Comment, *supra* note 16, at 1051.

[31] The majority of safety responsibility laws, including Mississippi's, are based on the Model Act contained in Chapter 7 of the Uniform Vehicle Code of 1956. Kesler v. Department of Pub. Safety, 396 U.S. 153, 165-66 (1961); *see, e.g.,* ALA. CODE §§ 32-7-1 to -42 (1975 & Supp. 1982); ARIZ. REV. STAT. ANN. §§ 28-1101 to -1225 (1976 & Supp. 1982); DEL. CODE ANN. §§ 2901-2972 (1974); LA. REV. STAT. ANN. §§ 32:851-1043 (West 1963 & Supp. 1983); MISS. CODE ANN. §§ 63-15-1 to -75 (1972 & Supp. 1982); MONT. CODE ANN. §§ 61-6-101 to -151 (1981); NEV. REV. STAT. §§ 485.010 to .420 (1981); OHIO REV. CODE ANN. §§ 4509.01 to .99 (Page 1982); TEX. REV. CIV. STAT. ANN. art. 6701h (Vernon 1977).

a driver involved in any accident resulting in the specified amount of loss to file a report with the Safety Responsibility Department.[32] This report informs the department of the driver's ability to provide compensation for losses resulting from the accident.[33] If the driver can meet statutory requirements for proof of ability to compensate for damage from the accident, he will be exempt from further operation of the law.[34] Exemptions are most commonly based upon the existence of effective liability insurance coverage.[35]

A driver who does not qualify for an exemption must comply with certain security and proof of financial responsibility requirements[36] or lose both his license and his motor vehicle registration.[37] Although

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[32] MISS. CODE ANN. § 63-15-9 (Supp. 1982) provides in pertinent part:

> The operator of every motor vehicle which is in any manner involved in an accident within this state, in which any person is killed or injured or in which to the property of any one (1) person, other than himself, in excess of two hundred fifty dollars ($250.00) is sustained, shall within five (5) days after such accident report the matter in writing to the department, in accordance with the laws of this state.

[33] MISS. CODE ANN. § 63-15-9 (Supp. 1982) also provides in part:

> Such report, the form of which shall be prescribed by the department, shall contain information to enable the department to determine whether the requirements for the deposit of security under § 63-15-11 are inapplicable by reason of the existence of insurance or other exceptions specified in this chapter.

An accident form supplied by the Safety Responsibility Department must be filled out by the driver and returned to the department. A detachable part of the form, known as an SR-21, is mailed to any liability insurer named by the driver. The insurer is required to file the SR-21 if the liability policy specified by the driver was not in effect with respect to the accident. Telephone interview with Lieutenant Jerry Jones, Director of the Mississippi Safety Responsibility Department (Feb. 7, 1983).

[34] MISS. CODE ANN. § 63-15-11(4) (Supp. 1982) specifies that either an owner's or an operator's liability policy, or any other form of liability policy or bond applicable to damages from the accident, will exempt a driver or owner from the security and proof requirements of the chapter. Exemptions are also granted to self-insurers, owners of stolen vehicles, and persons against whom there is no reasonable probability that a judgment will be rendered. Motor vehicles owned by the state are also exempt from the requirements of the chapter. *Id.* § 63-15-5 (1972).

[35] Telephone interview with Lieutenant Jerry Jones, Director of the Mississippi Safety Responsibility Department (Feb. 7, 1983).

[36] *See supra* note 33.

[37] The security and proof of financial responsibility requirements are contained in MISS. CODE ANN. § 63-15-11 (Supp. 1982) and provide that security (in an amount determined by the department) and proof of financial responsibility must be submitted to the department within 60 days from the date of the accident. Unlike Mississippi, most jurisdictions require only that an amount be deposited as security after the accident. *See* Comment, *supra* note 16, at 1053.

these requirements can be met in a number of ways,[38] proof of financal responsibility is normally provided in the form of a liability policy obtained by the non-exempt driver from an insurance company. The policy must be certified by the company to comply with the provisions of the Act.[39] A liability policy may be voluntarily issued and certified by any insurance company authorized to write motor vehicle liability insurance.[40] In order to assure the availability of liability insurance for use as proof of financial responsibility, the Mississippi Legislature has established provisions for an assigned risk plan that *requires* insurers to issue liability policies to qualified drivers.[41]

The usual automobile liability policy is a two-party contract deemed to be for the protection of the insured against legal liability to third parties;[42] however, a policy certified as proof of financial respon-

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[38] Proof of financial responsibility can be furnished by a certificate of insurance, a bond, a certificate of deposit of money or securities, or a certificate of self-insurance. MISS. CODE ANN. § 63-15-37 (1972). The certificate of insurance is usually a standardized form SR-22, filed by the insurer, which states that the liability policy of an owner or operator has been issued to the party involved as required by and in compliance with the financial responsibility law of the state. Of the 11,000 operators whose licenses were suspended in Mississippi in 1982, 4,397 had their licenses reinstated by filing a form SR-22. Telephone interview with Lieutenant Jerry Jones, Director of the Mississippi Safety Responsibility Department (Feb. 7, 1983). Proof of financial responsibility is normally satisfied in other states as well by filing a certified liability insurance policy. *See* Comment, *supra* note 16, at 1057.

[39] Mississippi's Safety Responsibility Act provides in pertinent part:

> (1) A "motor vehicle liability policy" as said term is used in this chapter shall mean an owner's or an operator's policy of liability insurance, *certified as provided in section 63-15-39 or section 63-15-41, as proof of financial responsibility and issued* . . . by an insurance company duly authorized to write motor vehicle liability insurance in this state, to or for the benefit of the person named therein as insured.

MISS. CODE ANN. § 63-15-43 (Supp. 1982) (emphasis added).

[40] *Id.* § 63-15-39 (1972).

[41] Under the terms and conditions established by MISS. CODE ANN. § 63-15-65 (1972), insurers are required to formulate plans and procedures for issuing liability policies to those persons who are required to show proof of future financial responsibility. Only those who in good faith are entitled to liability insurance and who cannot otherwise obtain it are covered by the provision. *Id.* § 63-15-65.

Because the non-exempt driver is required to establish financial responsibility only after there has been an accident, the compensatory feature of the law applies only to benefit the victims of subsequent accidents. Thus, the laws have been characterized as "first bite laws." Though an uninsured and financially irresponsible driver can lose his license for failing to satisfy a judgment, this does not protect the victim of an accident in which the culpable driver is unable to pay damages. *See* Note, *California Financial Responsibility Laws-A Judicial Interpretation*, 20 HASTINGS L.J. 1273, 1276 (1969).

[42] 12 COUCH, *supra* note 4, § 45:7; *see also* Comment, *supra* note 16, at 1056 (liabil-

sibility is considered to be primarily for the protection of third parties.[43] To assure the protection of third parties, a certified policy is required to contain an omnibus clause that extends coverage to a greater number of potential drivers.[44] Additional statutory provisions also narrow the defenses of the insurer and further increase the risk assumed by the insurer.[45] In recognition of the increased risk to insur-

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ity policies are two-party indemnity contracts). The rights of a third party under a two-party liability policy depend on the validity and terms of the policy. *See* Eipp v. State Farm Mut. Auto. Ins. Co., 429 F. Supp. 675, 678 (D. Nev. 1976) (liability policy is contract between parties and should be construed according to intent of parties if not affected by statute or public policy); Benton v. Canal Ins. Co., 241 Miss. 493, 508, 130 So. 2d 840, 846 (1961) (third party protected by policy must bring himself within the terms thereof and stand upon those terms).

[43] *See* Urbom, *Safety Responsibility Acts: Availability of Policy Defenses After Certifying Presence of Insurance*, 29 INS. COUNS. J. 220, 224 (1962) (policy certified as proof of financial responsibility is thought to be for the benefit of the public generally and the injured person particularly); *cf.* Perez v. Campbell, 402 U.S. 637, 646-47 (1971) (the sole emphasis of financial responsibility law is to provide leverage for victims of another driver's carelessness); Travelers Indem. Co. v. Watkins, 209 So. 2d 630, 632 (Miss. 1968) (security responsibility law manifests an intention that liability policies should protect those injured by careless drivers as well as insured).

Also, it should be pointed out that a *certified* policy is referred to by the statute as a "motor-vehicle liability policy." MISS. CODE ANN. § 63-15-43(1) (Supp. 1982); *see supra* note 39. The other sections of the Code dealing with automobile insurance refer to an "automobile liability policy." *See, e.g.*, MISS. CODE ANN. § 83-11-1 (1972) (cancellation of automobile insurance); *id.* § 83-11-101 (Supp. 1982) (uninsured motorist coverage); *see also* Comment, *supra* note 16, at 1059 (noting that most courts have distinguished between voluntary and certified policies on the basis of the different terms used for each).

[44] The statutory omnibus clause is required as a part of every certified policy. MISS. CODE ANN. § 63-15-43(2)(b) (Supp. 1982); *see supra* note 7; *see also* National Union Fire Ins. Co. v. Truck Ins. Exch., 107 Ariz. 291, 486 P.2d 773, 776 (1971) (intent of omnibus clause requirement was to provide all-inclusive standard of coverage). For a statement by the Mississippi Supreme Court concerning the purpose of the omnibus clause, announced in Travelers Indem. Co. v. Watkins, 209 So. 2d 630 (Miss. 1968), see *infra* note 57.

An omnibus clause is commonly included as part of a voluntary liability policy, but the wording may differ from that of the statutory clause. See *supra* note 5 for the language of the voluntarily inserted omnibus clause in American's policy that is at issue in the instant case. An omnibus clause in a voluntary policy is usually construed according to general rules applicable to insurance contracts. 12 COUCH, *supra* note 4, § 45:294. Further complicating the construction and interpretation of omnibus clauses is the fact that they may be required as part of a compulsory insurance statute or general statute declaring that all liability policies in a state must contain a specified omnibus clause. *Id.* § 45:309; *see, e.g.*, CAL. INS. CODE § 11580.1(4) (West Supp. 1982); MO. ANN. STAT. § 303.1902(2) (Vernon Supp. 1982).

[45] MISS. CODE ANN. § 63-15-43(6) (Supp. 1982) provides in part:

> (6) Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:

ers that issue certified policies,[46] the Mississippi Safety Responsibility Act allows the insurer to charge premiums comensurate with the risk assumed[47] and to seek reimbursement from the insured in certain circumstances.[48]

Because safety responsibility laws only purport to compel insurance for financially irresponsible drivers,[49] most courts have held that voluntarily acquired insurance is unaffected by the provisions of the law.[50] Although the Mississippi Safety Responsibility Act was enacted

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(a) the liability of the insurance company with respect to the insurance required by this chapter shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be cancelled or annulled as to such liability by any agreement between the insurance company and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy.

[46] *See* Urbom, *supra* note 43, at 225 (cautioning insurers as to the increased risks that attend a certified policy). *But see infra* notes 48 & 49 and accompanying text (protection afforded insurer).

[47] MISS. CODE ANN. § 63-15-65 (1972) (insurance commission may set rates that are commensurate with greater hazards of assigned risk plan).

[48] *Id.* § 63-15-43(8) (Supp. 1982) provides:

(8) Any motor vehicle liability policy may provide that the insured shall reimburse the insurance company for any payment the insurance company would not have been obligated to make under the terms of the policy except for the provisions of this chapter.

While there are no Mississippi decisions interpreting this reimbursement provision, other courts considering similar assigned risk plans have reached conflicting results. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Read Mullan Motor Co., 108 Ariz. 577, 503 P.2d 798, 800 (1972) (issuers of certified policies may provide in the policy for reimbursement, but statutory provision is not self-executing); Atlantic Casualty Ins. Co. v. Edwards, 42 N.J. Super. 586, 127 A.2d 459, 460 (1956) (reimbursement provision in policy, though allowed by statute, conflicted with further statutory provision requiring policy to insure party named therein).

[49] *See supra* notes 26, 34, 43 and accompanying text.

[50] *See, e.g.*, Farmer's Ins. Exch. v. Ledesma, 214 F.2d 495, 500 (10th Cir. 1954) (New Mexico's Safety Responsibility Act held applicable only to policies issued to driver after coming within the provisions requiring proof of financial responsibility); Bankers & Shippers Ins. Co. v. Phoenix Assurance Co., 210 So. 2d 715, 719 (Fla. 1968) (provisions of financial responsibility law apply only from date policy is furnished as proof); Lynch-Davidson Motors v. Griffin, 182 So. 2d 7, 8, 10 (Fla. 1966) (reversing lower appellate court's ruling that provisions of financial responsibility law became part of insurance policy taken out before driver was involved in accident); Vigneault v. Travelers Ins. Co., 118 N.H. 75, 382 A.2d 910, 912 (1978) (provisions of financial responsibility law applied only after drivers commit specified offense or are involved in an accident, and voluntary liability policies remain unaffected); United States Casualty Co. v. Brock, 345 S.W.2d 461, 463 (Tex. Civ. App. 1961) (provision making insurer's coverage absolute only applied to certified policies); *see also* 12A COUCH, *supra* note 4, § 45:757 (citing numerous

in 1952,[51] the question of whether the provisions of the Act affect voluntarily acquired insurance was not considered by the Mississippi Supreme Court until 1968, in *Travelers Indemnity Co. v. Watkins*.[52] In *Watkins*, the court stated that public policy in Mississippi, as legislatively manifested by the Safety Responsibility Act[53] and the Uninsured Motorists Vehicle Act,[54] required that automobile liability insurance protect the victims of careless drivers as well as named insureds and permittees.[55] The *Watkins* court then held that a minor deviation from the scope of permission by a permissive user[56] of an insured vehicle was not enough to prevent liability coverage under an omnibus clause,[57] but the opinion was unclear as to what effect, if any, the provisions of the Safety Responsibility Act had upon the court's decision.[58] Although the court repeatedly emphasized the need to protect

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cases for proposition that provisions of financial responsibility laws do not apply to voluntary policies).

[51] Mississippi Motor Vehicle Safety Responsibility Act, ch. 359, § 39, 1952 Miss. Laws 532 (currently codified at Miss. Code Ann. §§ 63-15-1 to -75 (1972 & Supp. 1982).

[52] 209 So. 2d 630 (Miss. 1968).

[53] Miss. Code Ann. §§ 63-15-1 to -75 (1972 & Supp. 1982).

[54] *Id.* §§ 83-11-101 to -111.

[55] 209 So. 2d at 631-32. The insurance policy that the court construed in *Watkins* contained a standard omnibus clause extending coverage to anyone using the vehicle with the permission of the named insured provided that the actual use was within the scope of the permission. *Id.* at 631.

[56] The court cited the three rules generally applied to construe the scope of permission within an omnibus clause: (1) the strict or conversion rule, (2) the liberal or initial permission rule, and (3) the moderate or minor deviation rule. *Id.* at 633.

The conversion rule was defined as limiting coverage to actual uses of the motor vehicle within the contemplation of the insured when permission for use of the automobile was given. *Id.* The initial permission rule was defined as extending coverage to every subsequent use provided that the orignal use was with the insured's consent. *Id.* The minor deviation rule was defined as extending coverage to all uses which do not amount to a gross violation of the scope of the original permission. *Id.*

After a brief examination of each, the minor deviation rule was adopted. The adoption of this rule brought the driver within the coverage of the omnibus clause. *Id.* at 634-35. *See generally* 6C J.A. Appleman & J. Appleman, Insurance Law and Practice (1979) §§ 4366-68 (discussion of initial permission rule, conversion rule, and minor deviation rule).

[57] 209 So. 2d at 634. The court stated that the purpose of an omnibus clause has been described as a liberalizing one, and that in addition to providing protection for the named insured and the permittees, the clause is intended to protect any person injured by a car. *Id.* at 632.

[58] The court noted that a report of the accident had been made to the Safety Responsibility Bureau, that the insurer had not disclaimed liability, and that this prevented the driver from losing his license. In addition, the court noted that the policy stated that it would comply with the financial responsibility law when certified. The

victims from uncompensated loss,[59] it expressly declined to adopt the initial permission rule, which would have afforded maximum protection for the public by extending coverage to all subsequent drivers, provided that the original driver had the insured's consent.[60]

In *Travelers Indemnity Co. v. Chappell*,[61] the public policy underlying of the Safety Responsibility Act was again considered. Public policy, however, was interpreted by the *Chappell* court to limit rather than expand the insurer's coverage.[62] The court held that an insurer, through operation of a clause restricting the payment of damages on behalf of a garage customer, could limit the amount of its liability coverage to the applicable statutory minimum.[63] Although the court had reviewed two escape clauses in the policy,[64] the provisions of the Safety Responsibility Act were not considered in the lengthy examiniation of those clauses. The decision in *Chappell* made it clear that an insurer in Mississippi is not obligated to extend coverage in excess of the statu-

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significance of these facts, however, was not explored. *Id.*

[59] Protecting victims of accidents from uncompensated loss is the only public policy recognized by the court as fundamental to the Safety Responsibility Act. *Id.* at 632, 634. Contrary to the Mississippi Supreme Court's policy statement, it has been expressed that the protection of innocent victims is only one of the competing policy reasons for the law. *See* Note, *California Financial Responsibility Laws—A Judicial Interpretation*, 20 HASTINGS L.J. 1274, 1290 (1973); *see also* R. DWORKIN, TAKING RIGHTS SERIOUSLY, 109 (1977) (the canonical terms of the actual statute provide a limit on the role of policy in judicial interpretation).

[60] 209 So. 2d at 634. Before rejecting the initial permision rule, the court noted that it is based on the theory that an insurance contract is beneficial for the public as well as the insured. *Id.*

[61] 246 So. 2d 498 (Miss. 1971).

[62] *Id.* at 507. The court stated that the legislature recognized that public policy required drivers to make themselves financially responsible for damages resulting from their negligence, but only under the conditions of the Act, and only to the limited extent set forth in the Act. *Id.*

[63] *Id.* at 506. In a concurring opinion, Justice Smith distinguished between ordinary permissive users and garage customers, and stated that the latter presented a greater hazard; however, Justice Smith relied upon a provision of the Security Responsibility Act in finding that the insurer should be allowed to limit its liability. *Id.* at 508-09; *see also supra* note 13 (text of provision exempting excess coverage).

[64] 246 So. 2d at 500. Both the garage that owned the car and the customer driving the car had liability policies that provided that if other insurance was in effect, and sufficient to pay the damages, no compensation would be collected under this policy. *Id.* at 500-01. The court found the clauses to be mutually repugnant. *Id.* at 504. At least one other court has held that a similar provision was unenforceable as a violation of public policy. *See* Metz v. Universal Underwriters Ins. Co., 10 Cal. 3d 45, 513 P.2d 922, 928, 109 Cal. Rptr. 698, 704 (1973) (other insurance clause construed to afford coverage under garage endorsement). *But see* 12A COUCH, *supra* note 4, § 45:1155 (other insurance clauses may exclude liability).

tory minimum if statutory provisions are referred to in the policy itself.[65] The court, nevertheless, failed to explain the extent to which the Safety Responsibility Act otherwise affected an insurer's obligations under a voluntary policy.

This question was partially answered in *United States Fidelity & Guaranty Co. v. Stafford*.[66] Relying heavily on the public policy enunciated in *Watkins*,[67] the court stated that when the coverage of a liability policy and the coverage specified in the Safety Responsibility Act differ, the provisions of the statute will be incorporated into the policy.[68] Thus, the "implied permission" referred to by the Safety Responsibility Act[69] was substituted for the "permission" required by the policy,[70] thereby making the driver an additional insured within the coverage of the statutory omnibus clause.[71] Conspicuously absent from the *Stafford* opinion was any discussion or explanation of the procedural applicability of the Safety Responsibility Act to the apparently voluntary policy.[72]

The *Stafford* decision was followed in two subsequent Mississippi cases that involved the interpretation of omnibus clauses in automobile liability policies. In *State Farm Mutual Automobile Insurance Co. v. Moore*,[73] the Mississippi Supreme Court again was faced with an issue concerning the use of an automobile by a second permittee.[74] The

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[65] 246 So. 2d at 506. In his concurring opinion, Justice Smith noted that above the limits set by law the amount of liability insurance is a matter of personal choice.

[66] 253 So. 2d 388 (Miss. 1971). The son of the named insured had given permission to a friend to drive the insured automobile in a drag race. The son was a passenger in the car when the driver struck and killed the flagman. After obtaining a judgment against the driver, the mother of the decedent brought suit against the liability insurer of the vehicle owner. *Id.* at 389.

[67] *See supra* text accompanying notes 55 & 59.

[68] 253 So. 2d at 391.

[69] *See supra* note 7.

[70] 253 So. 2d at 390. The court expressly found that the car had been driven with the named insured's implied permission. The court, however, seemed to rely on general principles of construction rather than on statutory construction. *Id.* at 392-93. Under the circumstances of *Stafford*, the court could have found that the "permission" required by the policy had been given. *See* 12A COUCH, *supra* note 4, § 45:420 (operation by another person while first permittee is passenger is permitted use within omnibus clause); *id.* § 45:431 (when car was purchased for exclusive use of minor, many courts hold that authority to delegate permission will be assumed).

[71] 253 So. 2d at 393.

[72] The court, however, did recognize that the driver involved would be unable to pay the judgment rendered against him. *Id.* at 389.

[73] 289 So. 2d 909 (Miss. 1974).

[74] In *Moore*, as in *Stafford*, the car involved was primarily used by a minor, but the parent was the named insured. *Id.* at 910. At the time of the accident the car was driven

court, quoting extensively from *Stafford*, held that the driver was an additional insured by virtue of the implied consent of the insured party.[75] The same rationale was used in *Vaughn v. State Farm Mutual Automobile Insurance Co.*,[76] but the court reached a different result. In contrast to *Stafford* and *Moore*, the minor driver in *Vaughn* was held to have been outside the scope of the omnibus clause of the policy;[77] therefore, the insurer was allowed to deny coverage.[78] In *Moore* and *Vaughn* the court again failed to address the procedural applicability of the Safety Responsibility Act to apparently voluntary policies.

Federal courts construing Mississippi law have explored this question with somewhat confusing results. In *Missouri General Insurance Co. v. Youngblood*,[79] the Court of Appeals for the Fifth Circuit considered the effect of the Safety Responsibility Act and the Uninsured Motorists Coverage Act on an offset provision in an uninsured motorist endorsement.[80] A valid offset provision would have allowed the insurer

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within the scope of the permission given by the minor. *Id.* at 912. Under similar circumstances, other courts have held that general custody of the car implies authority to delegate permission. *See* 12 COUCH, *supra* note 4, § 45:31. It should also be noted that the Uniform Automobile Liability Security Act, approved in 1932 and adopted by Hawaii, Pennsylvania, and Washington, requires that all minors maintain proof of financial responsibility. Kesler v. Department of Pub. Safety, 369 U.S. 153, 161 & n.14 (1962).

[75] 289 So. 2d at 911. The court reasoned that because the named insured's son had broad, unfettered dominion over the insured automobile as the first permittee, and because the use of the car by the second permittee was for the son's benefit, this use was within the scope of the implied consent of the insured. *Id.* at 912.

[76] 359 So. 2d 339 (Miss. 1978). *Vaughn* also discussed the scope of permissive use in an automobile liability policy. The court again cited the provisions of § 63-15-43 and held that the omnibus clause contained in the policy must conform to the requirements of the Safety Responsibility Act. *Id.* at 341.

[77] *Id.* at 343. The insured's daughter had given permission to a friend to use the car, and an accident that injured a passenger in the insured's car occurred during this use. *Id.* at 340. The initial permission had been given by the insured to his ex-wife, the first permittee. Since the daughter was the second permittee, her permission to a third permittee was held to be outside the scope of the named insured's implied permission. *Id.* at 343.

[78] *Id.* In a vigorous dissent, Justice Bowling stated that the omnibus requirements of the Safety Responsibility Act had existed in Mississippi law for over 25 years. *Id.* He also stated that the regulatory agencies were at fault for not enforcing the requirement. *Id.* at 344. It should be noted, however, that the insurance commission is only empowered under the Act to regulate those policies issued under the assigned risk provisions. *See supra* note 47 and accompanying text. Furthermore, within the Safety Responsibility Act, MISS. CODE ANN. § 63-15-47 (1972) explicitly provides: "This chapter shall not be held to apply to or affect policies of motor vehicle insurance against liability which may now or hereafter be required by any other law of this state."

[79] 515 F.2d 1254 (5th Cir. 1975).

[80] *Id.*

to credit payments made under the uninsured motorist coverage against any claims the parties might have established against the driver under the liability endorsement.[81] After examining both Acts,[82] the court concluded that the offset provision was invalid because it conflicted with state policy.[83] In reaching this decision, the Fifth Circuit found that the provision, as applied to both the policyholder and the injured third parties, contravened the legislative plan of encourgaging the financial responsibility of policyholders.[84] The court further reasoned that denial of coverage could cause the policyholder to have his license suspended under the provisions of the Safety Responsibility Act[85] because of his failure to satisfy the requirement of proof of financial responsibility.[86] Even though the court devoted most of the opinion to issues concerning the Safety Responsibility Act, the effect of

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[81] *See id.* at 1256.

[82] The court stated that neither law was a "paradigm of legislative exactitide," and that neither required a driver to insure unless he was involved in an accident and was unable to demonstrate financial responsibility. *Id.*

[83] *Id.* at 1258.

[84] The court based this conclusion on a further provision in the policy itself rather than on the Act. *Id.* at 1258; *see infra* note 85.

The court noted that uninsured coverage is mandatory on the insurer and that Mississippi cases have generally disapproved limitations of this coverage. 515 F.2d at 1258. Additionally, the court found that the offset provision indirectly would do what the insurer could not do directly. *Id.; see also* Richards v. Allstate Ins. Co., 693 F.2d 502, 506 (5th Cir. 1982) (affirming punitive damage award of $375,000 against insurer for exclusion of uninsured coverage in contravention of Mississippi law).

[85] The court found that the exemption provided by law for insured drivers, *see supra* note 34, would not be available if coverage was denied. 515 F.2d at 1257.

[86] 515 F.2d at 1257. The policy contained a conformity provision that stated: "When this policy is certified as proof of financial responsibility for the future under the provisions of the motor vehicle financial responsibility law . . . such insurance as is afforded by this policy for bodily injury liability . . . shall comply with the provisions of such law . . . ." *Id.* The court reasoned that this provision was inconsistent with the offset provision because the former required strict compliance with state law. *Id.*

The effect of such a conformity clause apparently depends on the particular wording used. A number of courts have held that a clause referring to "future" proof does not have the effect of conforming the policy to the law with respect to first accidents. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Read Mullan Motor Co., 108 Ariz. 577, 503 P.2d 798, 799-800 (1972) (provision for reimbursement in conformity clause operated only if policy was certified as future proof); Bankers & Shippers Ins. Co. v. Phoenix Assurance Co., 210 So. 2d 715, 719 (Fla. 1968) (conformity clause relating to future does not conform policy to law with respect to first accident); Lynch-Davidson Motors v. Griffin, 182 So. 2d 7, 9-10 (Fla. 1966) (qualifications in conformity clause must be met before it can be given effect); Vigneault v. Travelers Ins. Co., 118 N.H. 75, 382 A.2d 910, 913 (1978) (clause voluntarily inserted does not have force of statute and operated only after certification).

the Act on the liability coverage remained unclear because of the presence of uninsured motorist coverage in the case.[87]

In *Preferred Risk Mutual Insurance Co. v. Poole*,[88] a federal court again examined the provisions of the Mississippi Safety Responsibility Act and the Uninsured Motorists Coverage Act. In upholding the validity of an employee exclusion[89] and a cross-employee exclusion[90] in an automobile liability insurance policy, the United States District Court for the Northern District of Mississippi concluded that the Safety Responsibility Act was not intended to guarantee minimum liability coverage and that nothing in the Act prevented uninsured motorists from driving in the state.[91] Because liability coverage was successfully excluded, the court found that the occupants of the vehicle came under the coverage of the policy's uninsured motorist endorsement.[92]

The question of the applicability of the provisions of the Safety

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[87] The Fifth Circuit also relied on Mississippi cases that discussed uninsured motorist coverage. 515 F.2d at 1258.

[88] 411 F. Supp. 429 (N.D. Miss. 1976).

[89] The employee exclusion clause excluded from coverage injuries arising out of employment by the insured. Applying Mississippi law, the court found the exclusion to be effective when the injured party was the employee of any person insured under the policy. *Id.* at 433.

[90] The cross-employee exclusion clause provided:

> "The insurance with respect to any person or organization other than the named insured or such spouse does not apply: . . . .(2) to an employee with respect to injury or sickness, disease or death of another employee of the same employer injured in the course of business employment in an occurrence arising out of the maintenance or use of the automobile in the possession of such employer."

Id.

The driver of the insured vehicle and the two occupants were employees of the named insured. All three were killed, and the heirs of the passengers brought suit against the driver's estate. *Id.* at 432. The court held that the cross-employee exclusion in the employer's policy was valid under Mississippi law. *Id.* at 433.

[91] *Id.* at 435. The court cited § 63-15-43(5) of the Safety Responsibility Act, which allows exclusion of employees of the insured from liability coverage otherwise required by the Act. The court refused to accept the defendants' interpretation that the exclusion only applied to prevent duplication of workmen's compensation benefits. *Id.* at 435.

[92] *Id.* at 439. Since the insured was injured and was statutorily entitled to coverage, the court held that an exclusion from uninsured motorist coverage was ineffectual to the extent that it applied to damages resulting from the use of an "insured automobile." *Id.*; *see also* Phillips, *A Guide to Uninsured Motorist Insurance Law in Mississippi*, 52 MISS. L.J. 255, 259 (1982) (noting that provisions of uninsured motorist coverage are mandatory and override terms in policy); *1979 Mississippi Supreme Court Review*, 50 MISS. L.J. 813, 821-22 (1979) (uninsured motorist coverage intended to compensate for flaws in financial responsibility laws).

Responsibility Act to a voluntary automobile liability policy was fully addressed by the Court of Appeals for the Fifth Circuit in *Hague v. Liberty Mutual Insurance Co.*[93] Even though the policy had been written under the assigned risk provisions of the Act,[94] the court held that the further provisions of the Act did not apply because the policy was not issued or certified as proof of financial responsibility.[95] Because the policy was not covered by those provisions, the Fifth Circuit ruled that the insurer could deny coverage based on lack of notice.[96]

In the instant case, the court reasoned that because the Mississippi Supreme Court had interpreted the requirements of the Safety Responsibility Act to apply to all automobile liability policies,[97] and because the court was bound to apply Mississippi law,[98] the statutory provisions of the Act were incorporated into the policy issued by the defendant prior to the accident.[99] Further, it was reasoned that because Mississippi jurisprudence requires that any differences between the provisions of an automobile liability policy and the requirements of

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[93] 571 F.2d 262 (5th Cir. 1978).

[94] *See* MISS. CODE ANN. § 63-15-65 (1972) (setting forth assigned risk plan). The court in *Hague* noted that the assigned risk plan had two parts: a "mandatory" plan for persons required to furnish proof of financial responsibility and a "voluntary" plan for those having difficulty in obtaining policies through normal procedures. 571 F.2d at 266. The policy in question was written under the " voluntary" plan for a taxicab company that had difficulty obtaining insurance. *Id.*

[95] 571 F.2d at 266-67. The provisions of MISS. CODE ANN. § 63-15-39 (1972), requiring a written certificate as proof of financial responsibility, were cited by the court in support of the view that only insurance used to furnish such proof was covered by the provisions of the Act. *Id.* at 265. It was further noted that the special term "motor-vehicle liability policy" was used to define insurance required and governed by the Act. *Id.* at 266; *see supra* note 43.

[96] 571 F.2d at 267; *see* Southwestern Fire & Casualty Co. v. Kovar, 227 Miss. 386, 395-96, 86 So. 2d 356, 359 (1956) (neither Texas nor Mississippi's safety responsibility law prevented insurer from asserting lack of notice as a defense following a covered injury even when insurer had received form SR-21).

The provision asserted by the plaintiff in *Hague* was MISS. CODE ANN. § 63-15-43(6)(a) (Supp. 1982), which states that the insurer's liability becomes absolute after a covered injury occurs. 571 F.2d at 265.

[97] Universal Underwriters Ins. Co. v. American Motorists Ins. Co., 541 F. Supp. 755, 759 (N.D. Miss. 1982); *see supra* notes 68-72, 76-78 and accompanying text.

[98] The jurisdiction of the federal court was based upon diversity of citizenship. 541 F. Supp. at 756. Judge Keady cited the Fifth Circuit's opinion in *Hague, see supra* notes 93-96 and accompanying text, with approval before finding that he was bound to apply Mississippi law. 541 F. Supp. at 759-60. *Hague* was interpreted as holding that the omnibus provisions of the Safety Responsibility Act did not apply to policies issued and in effect prior to an accident. *Id.* at 759.

[99] 541 F. Supp. at 760.

the Safety Responsibility Act be resolved in accordance with the statute,[100] and because the exclusion in the defendant's policy was not expressly authorized by the statute, the exclusion was unenforceable to the extent of the minimum coverage required by the statute.[101] The coverage allowed under defendant's policy in excess of the statutory limits, however, was held to be expressly exempt from the statutory omnibus clause of the Safety Responsibility Act.[102] Finding that the

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[100] *Id.* (citing State Farm Mut. Auto. Ins. Co. v. Moore, 289 So. 2d 909 (Miss. 1974)); *see supra* notes 73-75 and accompanying text, and United States Fidelity & Guar. Co. v. Stafford, 253 So. 2d 388 (Miss. 1971); *see also supra* notes 67-72 and accompanying text. The court found that in the past this rule had been applied to enforce the exact language of the statutory omnibus clause against an insurer when the policy's omnibus clause purported to cover different persons. 541 F. Supp. at 760. The court further noted that in Missouri Gen. Ins. Co. v. Youngblood, 515 F.2d 1254, 1257 (5th Cir. 1975), *see supra* notes 79-87 and accompanying text, the Fifth Circuit had invalidated an insurer's attempt to limit liability through policy provisions that conflicted with the statutory law. 541 F. Supp. at 760.

[101] 541 F. Supp. at 761. The only exclusion expressly authorized by statute is the employee exclusion. MISS. CODE ANN. § 63-15-43(5) (Supp. 1982); *see supra* note 91. The court reasoned that the public policy considerations recognized in *Stafford*, *Moore*, and *Vaughn* required strict adherance to the statutory definition of an omnibus insured. Finding that the statutory omnibus clause neither expressly prohibited nor authorized the automobile garage exclusion in defendant's policy, Judge Keady held that the exclusion was ineffective to the extent of the statutorily required minimum policy level. *Id.* at 761; *see supra* note 7.

Because there were no Mississippi cases dealing with the effect of the Safety Responsibility Act on this type of exclusion, the court relied on cases from other jurisdictions that have construed statutory omnibus clauses. The court noted that policy provisions purporting to exclude certain classes of users from coverage have frequently been held void as against public policy, and that only those exclusions expressly stated in the statute are usually found to be permissible. 541 F. Supp. at 761. Cases cited by the court included: National Union Fire Ins. Co. v. Truck Ins. Exch., 107 Ariz. 291, 486 P.2d 773, 776 (1971) (only exclusions expressly described by statute are permissible); Metz v. Universal Underwriters Ins. Co., 10 Cal. 3d 45, 513 P.2d 922, 929-30, 109 Cal. Rptr. 698, 705-06 (1973) (invalidating exclusion of drivers that had other collectible insurance); Unsatisfied Claim & Judgment Fund Bd. v. Clifton, 117 N.J. Super. 5, 283 A.2d 350, 353 (1971) (invalidating automobile business use exclusion).

It should be noted that *Metz* was based not on the financial responsibility law, but on a provision of the California Insurance Code. *See* 10 Cal. 3d at 51, 513 P.2d at 926, 109 Cal. Rptr. at 702. It should also be noted that the decision in *National Union* has apparently been modified by later decisions. *See* Luehrs v. Utah Home Fire Ins. Co., 450 F.2d 452, 456 (9th Cir. 1971) (finding "drive other cars" exclusion of coverage to be valid under Arizona law); Eipp v. State Farm Mut. Auto. Ins. Co., 429 F. Supp. 674, 679 (D. Nev. 1976) (interpreting Arizona and Nevada law to uphold exclusion of coverage of non-owned automobiles); *see also* Cohen, *supra* note 5, at 176 (critizing New Jersey judicial treatment of omnibus coverage).

[102] 541 F. Supp. at 761. The court noted that the policy limits were $100,000 per

exclusion did not violate public policy apart from the Safety Responsibility Act,[103] the court concluded that the exclusion was effective with respect to the excess coverage.[104]

Even though the district court's opinion in the instant case aptly points out the weaknesses in the Mississippi Supreme Court's treatment of the Safety Responsibility Act,[105] the holding of the court necessarily extends the reach of this questionable treatment. Although the state supreme court has extended the provisions of the Act to apply to voluntary policies[106] in apparent disregard of the applicability of these

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injured person up to a limit of $300,000 per occurrence. The limits under the statutory omnibus clause, MISS. CODE ANN. § 63-15-43 (Supp. 1982), are $10,000 per injured person up to a limit of $20,000. These limits are applicable to injuries of two or more persons per occurrence. The court concluded that the automobile garage exclusion in American's policy was ineffective up to the statutory $10,000/20,000 limits, but that the exclusion was enforceable as applied to the excess coverage of $90,000/$280,000. 541 F. Supp. at 757, 760-61.

[103] 541 F. Supp. at 761.

[104] *Id.* Judge Keady stated that it was clearly the legislature's intent to leave an insurer free to make reasonable contractual provisions in a liability policy for more than the statutory limits. In addition, he recognized that because an insurer has a legitimate interest in protecting itself from the greater hazards of automobile business use, it should have the right to insert an automobile business or garage exclusion. Finding the automobile garage exclusion in American's policy to be clear and unambiguous, the court held that this exclusion effectively denied coverage in excess of the statutory minimum. Even though American was found to be the primary insurer, the court held that American's obligations had been discharged through the sums expended in settlement and defense of the state court actions. The funds, therefore, paid in settlement by Universal were found to be unrecoverable from American, and the entire action was dismissed with prejudice. *Id.* at 761-62; *see supra* note 11.

The court distinguished the instant case from decisions cited by American that had upheld exclusion clauses. The court found that those cases had been decided without any reference to the terms of the statutory omnibus clause. In light of *Stafford, Moore,* and *Vaughn,* the court determined that American's policy should be governed by the Act to the extent of the statutory minimum. *Id.*

Mississippi cases cited by American in which exclusions were upheld included: United States Fidelity & Guar. Co. v. Mathis, 236 So. 2d 730, 733 (Miss. 1971) (exclusion of insured's son held to be effective and binding when signed by insured in consideration of insurer's forebearance of cancellation); Benton v. Canal Ins. Co., 241 Miss. 493, 510, 130 So. 2d 840, 847 (1961) (employee exclusion upheld as unambiguous); Ellis v. Southern Farm Bureau Casualty Ins. Co., 233 Miss. 840, 848, 103 So. 2d 357, 360 (1958) (exclusion of coverage of anyone other than named insured and members of his family upheld on contract principles).

[105] *See* 541 F. Supp. at 759-60. The court stated that the policy owner in *Vaughn* was exempt from provisions of MISS. CODE ANN. § 63-15-11(2) requiring proof of financial responsibility by virtue of the fact that his policy had been obtained prior to the accident. *Id.* at 759-60.

[106] *See supra* notes 66-78 and accompanying text.

provisions[107] and in reliance on broad formulations of public policy,[108] such extension has evolved only to interpret the bounds of permissive use[109] and limit the insurer's obligation.[110] The Mississippi court has not applied any of the other provisions of the Act to override an insurer's defense[111] or to change the terms of a policy.[112]

In spite of the previously limited application, the district court's expanded application in *Universal* was dictated by the broad holdings of the Mississippi Supreme Court with respect to the effect of the Act on all automobile liability policies.[113]

The threshold question of the applicability of the Safety Responsibility Act has been decided solely on the basis of the Mississippi Supreme Court's conception of public policy[114] and without regard to the requirements of the Act[115] apart from the statutory omnibus provision.[116] As a result, the effect of the Act has been felt only by insurers,

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[107] *See supra* note 50 and accompanying text.

[108] *See supra* notes 53-55, 59 and accompanying text.

[109] *See supra* notes 66, 70, 74-77 and accompanying text.

[110] *See supra* notes 62-65 and accompanying text.

[111] *See* Casualty Reciprocal Exch. v. Wooley, 217 So. 2d 632, 635-37 (Miss. 1969)(insurer allowed to rescind policy after accident when safety responsibility law was raised); Southwestern Fire & Casualty Co. v. Kovar, 227 Miss. 386, 396, 86 So. 2d 356, 359 (1956) (insurer's defense of lack of notice unaffected by safety responsibility law). *But see supra* note 45 and accompanying text.

[112] *See supra* note 64 and accompanying text.

[113] *See supra* text accompanying note 68.

[114] *See supra* note 59 and text accompanying notes 67-68.

[115] Examples of the manner in which the Mississippi Supreme Court has ignored the substantive provisions of the Act can be found in *Moore* and *Stafford*, where the court extended coverage under the Act. *See supra* notes 66-75 and accompanying text. In both opinions the court omitted a substantial part of the definition of "motor vehicle liability policy," defining the term as follows: "A 'motor vehicle liability policy' as said term is used in this Act shall mean an owner's or an operator's policy of liability insurance . . . ." *See Moore*, 289 So. 2d at 911; *Stafford*, 253 So. 2d at 390. The entire definition provides:

> A 'motor vehicle liability policy' as said term is used in this Act shall mean an owner's or an operator's policy of liability insurance *certified as provided in section 63-15-39 or section 63-15-41, as proof of financial responsibility, and issued, except as otherwise provided in section 63-15-41, by an insurance company duly authorized to write motor vehicle liability insurance in this state, to or for the benefit of the person named therein as insured.*

MISS. CODE ANN. § 63-15-43(1) (1972) (emphasis added). By omitting this portion of the law, the court has managed to avoid the procedural significance of certification. *See supra* notes 43, 44, 48, 50, 95 and accompanying text.

[116] MISS. CODE ANN. § 63-15-43(2)(b) (Supp. 1982). It should be noted that this section directly follows and is dependent on the definition of "motor vehicle liability policy." *See supra* note 7.

who are required to provide liability coverage at no additional cost[117] for negligent drivers who have injured third parties.[118] Even though a cursory review of the Act reveals that it is aimed primarily at financially irresponsible drivers,[119] and not insurers,[120] the Mississippi Supreme Court's application has allowed the negligent driver to escape the provisions relating to security and future financial responsibility.[121]

The question of the applicability of the Safety Responsibility Act to exclusions in voluntary automobile liability policies should be reconsidered in view of the provisions of the Act and the underlying public policy. One of the aims of the Act unquestionably is to assure a source of compensation for victims of traffic accidents,[122] but the means provided by the Act do not include judicial reconstruction of voluntary automobile liability insurance policies.[123] Until they are certified as proof of financial responsibility,[124] these policies are governed, not by the Safety Responsibility Act but by the insurance laws of the state.[125]

One law applicable to voluntary policies is the Uninsured Motorists Act,[126] which was intended to fill the gap left by the Safety Responsibility Act by protecting victims of financially irresponsible drivers.[127] Insurers are required to make this coverage available in order to allow victims of financially irresponsible motorists to protect themselves from uncompensated loss.[128] If drivers still choose to drive with-

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[117] *But see supra* notes 47-48 and accompanying text.

[118] The drivers' negligence in *Universal* and *Stafford* resulted in the death of the third parties. *See Universal*, 541 F. Supp. at 757; *Stafford*, 253 So. 2d at 389.

[119] *See* MISS. CODE ANN. § 63-15-11(2) (Supp. 1982) (license and registration suspension for failure to furnish security and proof of financial responsibility). *See also supra* notes 32, 33, 37 & 48 and accompanying text (further provisions directly affecting motorists).

[120] The Act is codified under title 63 of the Mississippi Code, dealing with motor vehicles and traffic, not under title 83, which governs insurance. Liability insurance is only one of the means by which proof of financial responsibility can be shown. *See supra* note 38.

[121] *See supra* note 34 and accompanying text; *see also* MISS. CODE ANN. § 63-15-61 (1972) (driver, who is required to furnish proof of financial responsibility, must maintain proof for three years).

[122] *See supra* text accompanying notes 29 & 30.

[123] *See supra* note 59; *see also* MISS. CODE ANN. § 63-15-47 (1972) (chapter does not affect other policies of motor vehicle insurance).

[124] *See supra* notes 29, 50, & 95.

[125] *See supra* notes 24, 120 & 123.

[126] MISS. CODE ANN. §§ 83-11-101 to -111 (1972 & Supp. 1982).

[127] *See 1979 Mississippi Supreme Court Review, supra* note 92, at 821-22; *see also supra* note 41 (criticism of financial responsibility law).

[128] MISS. CODE ANN. § 83-11-101(1) (Supp. 1982) provides:

(1) No automobile liability insurance policy or contract shall be issued or

out insurance,[129] public policy should not require judicial rewriting of insurance policies to provide for their coverage. It should be noted that the cost of this expanded coverage will ultimately be borne by the policyholder,[130] and not by the financially irresponsible motorist.

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delivered after January 1, 1967, unless it contains an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages for bodily injury or death from the owner or operator of an uninsured motor vehicle.

[129] There is no mandatory insurance for motorists in Mississippi. *See* Missouri Gen. Ins. Co. v. Youngblood, 515 F.2d at 1256 (neither the Safety Responsibility Act nor the Uninsured Motorist Act requires any insurance to be issued, but the latter requires insurers to include *offer* of uninsured motorist coverage with liability policy); Preferred Risk Mut. Ins. Co. v. Poole, 411 F. Supp. 429, 435 (N.D. Miss. 1976) (Security Responsibility Act does not require liability coverage in any amount); *see also supra* note 29 (compulsory features deleted from uniform act).

[130] *See* MISS. CODE ANN. § 83-3-105(b) (1972) (consideration to be given to the class of risks in setting rates); *Universal,* 541 F. Supp. at 761 (family automobile policies not intended or designed for increased risk of automobile business); *see also* Estrada v. Planet Ins. Co., 26 Ariz. App. 103, 546 P.2d 372, 374 (1976) (exclusion from coverage of automobile principally garaged in Mexico reasonably recognized increased risk to insurer); CAL. INS. CODE § 11580.1(b)(4) (West Supp. 1982) (exclusion from coverage of statutory omnibus clause as to automobile or garage business use); 12 COUCH, *supra* note 4, § 45:1003 (exclusion of coverage as to garages and repair shops based on increased hazard to insurer); Cohen, *supra* note 5, at 174 (premiums calculated by insurer on basis of risks undertaken).

TORTS—IMMUNITY—SOVEREIGN IMMUNITY IS UNAVAILABLE AS A DEFENSE IN TORT ACTIONS AGAINST THE STATE OR ITS POLITICAL SUBDIVISIONS

Plaintiff[1] filed a tort action in the county court of the First Judicial District of Bolivar County, Mississippi, against defendant, the City of Rosedale, alleging that his injuries resulted from the negligent acts of the Rosedale Police Department.[2] The defendant asserted the defense of sovereign immunity and successfully demurred to the complaint.[3] Plaintiff appealed to the circuit court, which affirmed the lower court's ruling.[4] On appeal, the Mississippi Supreme Court, *held*, reversed and remanded. Except in the exercise of discretionary authority, the state, including its political subdivisions, may be held liable to persons foreseeably injured by its negligent acts or omissions. *Pruett v. City of Rosedale*, 421 So. 2d 1046 (Miss. 1982).

The doctrine of sovereign immunity,[5] which originated from the medieval maxim "the King can do no wrong,"[6] was introduced into American law in 1821 when Chief Justice Marshall declared that no suit could be commenced or prosecuted against the United States without its consent.[7] Individual states also adopted the doctrine,[8] with both

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[1] Plaintiff, Keith Pruett, was a resident and citizen of Bolivar County, Mississippi. Brief for Appellant at 1-2, Pruett v. City of Rosedale, 421 So. 2d 1046 (Miss. 1982).

[2] Plaintiff was shot during a robbery while working at a local convenience store. Plaintiff alleged that the robber's gun had been stolen from an unlocked and unoccupied city police car. Brief for Appellant, *supra* note 1, at 1-2. The plaintiff also alleged that the city reasonably should have foreseen the danger in leaving the weapon unsecured, because these weapons previously had been stolen from the same police authorities. *Id.*

[3] 421 So. 2d at 1046.

[4] Brief for Appellant, *supra* note 1, at 1.

[5] "Immunity" should be distinguished from "privilege." The holder of a privilege avoids liability for what would otherwise be tortious conduct because the circumstances surrounding that conduct would make it unjust or unreasonable to impose liability. Immunity, on the other hand, is derived from the status or position of the defendant and "does not deny the tort, but the resulting liability." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131, at 970 (4th ed. 1971).

[6] Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 2 (1924); *see also* W. PROSSER, *supra* note 5, § 131, at 970 (governmental immunities originated from divine right of kings).

[7] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821). Justice Holmes explained and affirmed the basis for the doctrine in Kawananakoa v. Polyblank, 205 U.S. 349 (1907), in which he stated: "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there

legislatures and courts endorsing immunity from tort liability for the states.[9] By the late 1800's, Mississippi recognized the doctrine.[10]

Although sovereign immunity implied absolute tort immunity for the state and its political subdivisions, the Mississippi Supreme Court held in 1911 that municipalities should not be granted immunity in all cases.[11] Consequently, along with the vast majority of states, Mississippi distinguished a municipality's governmental functions from its proprietary functions. Because of this distinction, municipalities were held liable for negligence in carrying out proprietary duties but were immune from tort actions arising from the performance of governmental functions.[12] For example, the Mississippi Supreme Court has held

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can be no legal right as against the authority that makes the law on which the right depends." *Id.* at 353; *see also* United States v. Lee, 106 U.S. 196, 207 (1882) (doctrine used to preclude enforcement of lien on property of United States); Hill v. United States, 50 U.S. (9 How.) 386, 389 (1850) (United States not liable for judgment against it as indorsee of promissory note).

Nevertheless, in 1946, the United States enacted the Federal Tort Claims Act, waiving its immunity and allowing suits to be brought against it in federal court. The Act imposed the following liability:

> [F]or injury caused by the negligence or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury or death in accordance with the law of the place where the act or omission occurred.

Federal Tort Claims Act, ch. 753, § 401, 60 Stat. 842, 842-47 (1946) (current version at 28 U.S.C. §§ 2671-80 (1976 & Supp. V 1981)). The Act enumerated a number of exceptions, 28 U.S.C. § 2680 (1976), and vested exclusive jurisdiction in the federal district courts, *id.* § 1346(b).

[8] *See* W. PROSSER, *supra* note 5, at 975.

[9] *See* Note, 30 VAND. L. REV. 295, 297 (1977).

[10] *See* Braham v. Board of Supervisors, 54 Miss. 363 (1877). In *Braham*, the Supreme Court of Mississippi declared: "A county can have no liability except as authorized, expressly or by necessary implication, by some statute. Counties are political subdivisions of the state . . . and can neither sue nor be sued, except as authorized by statute." *Id.* at 364. *See generally* Comment, 41 MISS. L.J. 289, 289-90 (1970) (neither state nor its subdivisions had tort liability in absence of statute authorizing recovery).

[11] *See* Reddit v. Wall, 55 So. 45, 46 (Miss. 1911) (unlike a county, a municipality may be liable for failure to keep streets and highways repaired).

[12] The distinction between "governmental" and "proprietary" functions was first applied in 1842 in Bailey v. City of New York, 3 N.Y. (Hill) 531 (1842), and became generally accepted in every jurisdiction except South Carolina, *see* Irvine v. Greenwood, 89 S.C. 511, 72 S.E. 228, 229-31 (1911), Florida, *see* City of Tallahassee v. Kaufman, 87 Fla. 119, 100 So. 150, 152 (1924), and for a short time, Ohio, *see* Fowler v. City of Cleveland, 100 Ohio St. 158, 126 N.E. 72, 76 (1919), *overruled* Aldrich v. City of Youngstown, 106 Ohio St. 342, 140 N.E. 164, 166 (1922). *See generally* Comment, *supra* note 10, at 290-91 (analyzing distinction between a municipality's governmental and private acts).

that municipalities could be held liable for the negligent construction and maintenance of streets[13] and sidewalks,[14] which were considered proprietary activities.[15] In contrast, the court held that in the establishment and regulation of schools, hospitals, fire departments, and police departments, municipalities acted in their governmental capacity and were not liable for torts arising from these activities.[16] This artificial distinction between proprietary and governmental functions elicited scholarly criticism in the first half of the twentieth century.[17] Despite the commentary castigating both the rule of municipal tort immunity and the doctrine of sovereign immunity in general, the overwhelming majority of American states, including Mississippi, continued

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[13] *See* Logan v. City of Clarksdale, 240 Miss. 716, 722, 128 So. 2d 537, 540 (1961); City of Laurel v. Hearn, 143 Miss. 201, 208, 108 So. 491, 492 (1926); City of Vicksburg v. Harralson, 136 Miss. 872, 883-84, 101 So. 713, 714 (1924); Whitfield v. City of Meridian, 66 Miss. 570, 576, 6 So. 244, 245 (1889).

A municipality could not be held liable for defects in its streets unless it had notice of the defects. Saxon v. Town of Houlka, 107 Miss. 161, 166, 65 So. 124, 124-25 (1914). The supreme court ruled that the notice requirement was satisfied whether notice was actual, constructive, or implied. Nesbitt v. City of Greenville, 69 Miss. 22, 29, 10 So. 452, 452 (1891).

[14] *See* City of Corinth v. Gilmore, 236 Miss. 296, 301, 110 So. 2d 606, 607 (1959); Jordan v. City of Lexington, 133 Miss. 440, 448-49, 90 So. 758, 760 (1923); City of Natchez v. Lewis, 90 Miss. 310, 314, 43 So. 471, 471 (1907); City of Pascagoula v. Kirkwood, 86 Miss. 630, 634, 38 So. 547, 547 (1905). Generally, a city was liable to a pedestrian for an injury sustained on a sidewalk only when the injury was caused by a defect that resulted from negligent maintenance and the city had notice of the defect. City of Greenville v. Laury, 172 Miss. 118, 121-22, 159 So. 121, 121-22 (1935).

[15] Municipalities were also held to have acted in their proprietary capacity in other situations. *See, e.g.*, Hawkins v. City of Natchez, 242 Miss. 91, 95-96, 133 So. 2d 610, 611-12 (1961) (constructing sewers); Brummett v. City of Jackson, 211 Miss. 116, 120, 51 So. 2d 52, 53-54 (1951) (operating municipal airports); Byrnes v. City of Jackson, 140 Miss. 656, 670, 105 So. 861, 863 (1925) (maintaining recreational facilities); City of Pass Christian v. Fernandez, 100 Miss. 76, 81-82, 56 So. 329, 329 (1911) (hauling trash).

[16] Bradley v. City of Jackson, 153 Miss. 136, 159, 119 So. 811, 816 (1928); *see also* Jones v. City of Amory, 184 Miss. 161, 167, 185 So. 237, 238 (1939) (city not liable for torts in establishment of schools, hospitals, fire departments, jails, workhouses).

[17] *See, e.g.*, Barnett, *The Foundations of the Distinction Between Public and Private Functions in Respect to the Common Law Tort Liability of Municipal Corporations*, 16 OR. L. REV. 250, 250 (1937) (distinction product of "misguided logic"); Borchard, *Governmental Responsibility in Tort: VII*, 28 COLUM. L. REV. 577, 589-90 (1928) (no criteria for determining governmental functions rendering label a justification of irresponsibility); Hobbs, *The Tort Liability of Municipalities*, 27 VA. L. REV. 126, 128-30 (1940) (governmental-proprietary distinction confused because courts do not adhere to logical divisions); Smith, *Municipal Tort Liability*, 48 MICH. L. REV. 41, 43-44 (1949) (judges invert the process, first determining whether liability should attach, then labelling the activity).

to apply the doctrine throughout the 1950's.[18]

In 1957, the Florida Supreme Court, in the landmark decision of *Hargrove v. Town of Cocoa Beach*,[19] initiated a trend toward judicial abrogation of the doctrine of sovereign immunity. In *Hargrove*, the widow of a man who had died while incarcerated in a local jail brought a wrongful death action against the municipality.[20] The trial judge sustained a motion to dismiss the complaint, holding that the municipality was immune from liability for this tort.[21] The Florida Supreme Court reversed the trial judge's decision. Noting that the sovereign immunity doctrine originated with the judiciary, the court rejected the contention that only the legislature could abolish the doctrine.[22]

Following Florida's lead,[23] the Illinois Supreme Court abolished the rule of governmental immunity in *Molitor v. Kaneland Community Unit District No. 302*.[24] In *Molitor*, the plaintiff instituted an action against a school district for personal injuries sustained when the school bus in which he was riding left the road, exploded, and

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[18] *See, e.g.*, Florey v. City of Burlington, 247 Iowa 316, 73 N.W.2d 770, 772 (1955); Nissen v. Redelack, 246 Minn. 83, 74 N.W.2d 300, 302 (1955); Scates v. Board of Comm'rs, 196 Tenn. 274, 265 S.W.2d 563, 565 (1954); Kilbourn v. City of Seattle, 43 Wash. 2d 373, 261 P.2d 407, 410 (1953); Britten v. City of Eau Claire, 260 Wis. 382, 51 N.W.2d 30, 32 (1952). *See generally* 41 MISS. L.J. 471, 481-83 (1970) (discussing trend toward abrogation of sovereign immunity but acknowledging continued acceptance in most jurisdictions); Note, *Sovereign Liability for Tortious Acts of Its Wards Occasioned by Failure to Exercise Proper Custodial Care*, 34 NEB. L. REV. 660, 661-72 (1955) (discussing inequities of sovereign immunity and abrogation at federal level by the Federal Tort Claims Act).

[19] 96 So. 2d 130 (Fla. 1957).

[20] *Id.* at 131. The plaintiff alleged that her husband, rendered helpless by excessive intoxication, had been incarcerated in the town jail; that the jailer had locked all the doors and departed, which left no guard or attendant on duty; and that during the night the cell had become filled with smoke, resulting in the fatal suffocation of her husband. *Id.*.

[21] *Id.*

[22] *Id.* at 131-33.

[23] In the same year that *Hargrove* was decided, Colorado appeared to abandon the doctrine when the Colorado Supreme Court stated in dictum that " 'sovereign immunity' may be a proper subject for discussion by students of mythology but finds no haven or refuge in this court." Colorado Racing Comm'n v. Brush Racing Ass'n, 136 Colo. 279, 316 P.2d 582, 585 (1957). Three years later, however, the same court, in City of Denver v. Madison, 142 Colo. 1, 351 P.2d 826, 829 (1960), ruled that the judicial branch lacked the power to modify the doctrine. *Id.* at 829. The court did not formally eliminate the doctrine until 1971. *See* Evans v. Board of County Comm'rs, 174 Colo. 97, 482 P.2d 968, 972 (1971) (doctrine of governmental immunity prospectively overruled as defense to tort claims).

[24] 18 Ill. 2, 11, 163 N.E.2d 89, 96 (1959), *cert. denied*, 362 U.S. 968 (1960).

burned.[25] Although the Illinois court accorded prospective operation to its holding, it allowed the plaintiff to utilize the new rule of law.[26] California followed the trend when its state supreme court abolished the doctrine of governmental immunity in a pair of companion cases decided in 1961. In the principal case, *Muskopf v. Corning Hospital District*,[27] Justice Traynor, writing for the court, stated that no level of government should be able to rely on the "governmental" nature of its functions as a defense to tort liability.[28] A year later, the supreme courts of Wisconsin[29] and Minnesota[30] abrogated the doctrine of sover-

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[25] 163 N.E.2d at 89-90.

[26] *Id.* at 98. Immediately after the *Molitor* decision, the Illinois legislature passed a statute limiting recovery against a school district to $10,000 and imposed a one-year statute of limitations for personal or property damage. ILL. REV. STAT. ch. 122, §§ 821-31 (1959). The state also enacted a statute that restored to counties in Illinois immunity against tort actions. *Id.* ch. 34, § 301.1.

Legislatures in jurisdictions in which the doctrine was judicially abrogated responded with laws similar to the Illinois statute.

In most instances, the ensuing legislation tended to ratify or confirm the judicial policy. *See* Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265, 289-90 (1963). But in a few states the legislative response to the judicial policy was to restore sovereign immunity by statute. *See, e.g.* COLO. REV. STAT. § 24-10-101 (1973) (restoring immunity abrogated by Evans v. Board of County Comm'rs, 174 Colo. 97, 482 P.2d 968 (1971)); ARK. STAT. ANN. § 12-2901 (Cum. Supp. 1977) (restoring immunity abrogated by Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968)); N.J. STAT. ANN. 59:1-1 (West Supp. 1977-1978) (restoring immunity abrogated by Willis v. Department of Conservation & Economic Dev., 55 N.J. 534, 264 A.2d 34 (1970)).

[27] 55 Cal. 2d 211, 359 P.2d 457, 460 (1961).

[28] 359 P.2d at 463. Justice Traynor stated, "[I]n holding that the doctrine of governmental immunity for torts for which its agents are liable has no place in our law we make no startling break with the past but merely take the final step that carries to its conclusion an established legislative and judicial trend." *Id.*

The effect of the ruling in *Muskopf* was lessened in the companion case, Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 359 P.2d 465 (1961). In *Lipman*, the court refused to sustain the imposition of liability on a public entity when its culpable employee was held immune from personal liability because of the discretionary nature of his duties. The court noted that official immunity was based on a policy of ensuring that the threat of tort liability would not serve as a deterrent to the fulfillment of a public servant's duty. 359 P.2d at 467.

[29] Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962). The Wisconsin court attempted to meticulously define the exact scope of its ruling by limiting immunity to governmental bodies exercising legislative, quasi-legislative, judicial, or quasi-judicial functions. 115 N.W.2d at 625. The Wisconsin court declared that, except for the case at bar, the new rule would be given effect only for events occurring on or after July 15, 1962, thus affording a reasonable period of time for public entities to protect themselves against potential liability. *Id.* at 626. The court also held that the state legislature retained full authority to modify or to restrict the newly declared tort responsibilities of public entities. *Id.* at 625. Following the *Holytz* decision, the Wisconsin legislature en-

eign immunity.

Following these early decisions, other state supreme courts also judicially modified or eliminated governmental immunity.[31] In 1973, the Supreme Court of Louisiana in *Board of Commissioners of the Port of New Orleans v. Splendour Shipping & Enterprises Co.*,[32] gave three reasons for abolishing sovereign immunity: (1) it was manifestly unfair to the injured persons;[33] (2) it encouraged governmental irresponsibility;[34] and (3) it was an unnecessary exception to the policies set forth in the state constitution.[35] The Alabama Supreme Court, abolished the

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acted statutes limiting the amount of damages recoverable by any person in a tort action against any "political corporation" or "governmental subdivision" to no more than $25,000 and prohibiting recovery of any punitive damages. WIS. STAT. ANN. § 895.43 (West Special Supp. 1966).

[30] Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1962). *Spanel* practically eliminated tort immunity for all local governmental entities. 118 N.W.2d at 803. The *state's* sovereign immunity, however, was not affected. *Id.* After *Spanel*, local entities remained immune for their "discretionary, as distinguished from ministerial activities, judicial, quasi-judicial, legislative, or quasi-legislative functions." *Id.* The change in the state law was prospective, applying only to injuries occurring after the adjournment of the next regular session of the Minnesota Legislature. *Id.* at 804.

[31] By 1970, immunity for local governmental entities had been abolished in 22 states, with 15 of the states doing so by judicial decree. Abolition of state sovereign immunity, nevertheless, did not occur as quickly because only 18 states had abolished the doctrine by 1970, with only five states acting by judicial decree. Legislative and judicial activism continued throughout the 1970's, and by 1978 local sovereign immunity had been repealed in all but six states and state sovereign immunity had been abolished in all but 10 states. *See* Note, 47 U. Mo. K.C.L. REV. 230, 233-34 (1978).

[32] 273 So. 2d 19 (La. 1973). In *Splendour*, the Board of Commissioners filed suit for damages sustained when Splendour's vessel struck a bridge operated by the Board. Answering the complaint, Splendour alleged contributory negligence and filed a reconventional demand for damages to its ship. The Board interposed the defense of sovereign immunity to the reconventional demand. *Id.* at 19-20. The court of appeals found that as an agency of the state, the Board enjoyed immunity from this type of action. *Id.* at 20. The supreme court reversed, holding that the Board of Commissioners and "other such boards and agencies" were not immune from tort liability. *Id.* at 26.

[33] *Id.* at 25.

[34] *Id.*

[35] *Id.* The court found a conflict between the doctrine of governmental immunity and the Louisiana Constitution, which stated in part that "every person for injury done him shall have adequate remedy by due process of law and justice administered without denial, partiality or unreasonable delay." LA. CONST. art. I, § 6. 273 So. 2d at 26. Prior to *Splendour*, this provision, in force since 1864, had never been considered inconsistent with the rule of governmental immunity. Comment, 34 LA. L. REV. 69, 73 (1973). Justice McCaleb, concurring, and Justice Summers, dissenting, argued that the 1960 constitutional amendment, which set forth certain guidelines for suit against state subdivisions, elevated the doctrine of sovereign immunity to constitutional status. 273 So. 2d at 26-29.

sovereign immunity doctrine in *Lorence v. Hospital Board*,[36] stating, "Where precedent can no longer be supported by reason and justice, we perceive it our duty to reexamine, and if need be overrule court made law."[37]

Notwithstanding the trend of judicial abrogation, many states, including Mississippi, refused to abolish the doctrine by judicial decree.[38] In several of these states, legislatures enacted statutes altering the doctrine.[39] The Mississippi Supreme Court, in a 1961 decision, noted that any change in the application of the doctrine should be made by the legislature because it could more thoroughly consider the question.[40] In 1977, the court again confronted the issue of whether the doctrine of sovereign immunity should be abrogated. The supreme court unanimously refused to do so in *Berry v. Hinds County*.[41] In 1979, however

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[36] 294 Ala. 614, 320 So. 2d 631 (1975). In *Lorence*, the plaintiff, a patient in a county hospital, instituted an action against the hospital board, claiming damages for an alleged sexual assault by an employee of the hospital. The trial court granted the hospital's motion for summary judgment and the plaintiff appealed. The supreme court reversed, holding that the county did not enjoy governmental immunity from suit for acts arising from the performance of either their governmental or proprietary functions. *Id.* at 632-34.

[37] *Id.* at 634.

[38] For example, the Supreme Court of Wyoming stated "While we are not unmindful of the force of the criticisms of this rule of immunity, we think the rule has become so well fixed as a part of the law . . . of this country that it is not to be disregarded by the courts until the Legislature declares a different policy. Ramirez v. City of Cheyenne, 34 Wyo. 64, 241 P. 710, 712 (1925); *see* Note, *supra* note 9, at 482; *see also* Note, *supra* note 31, at 234 n.50-51 (listing the jurisdictions that had not judicially abolished the doctrine by 1978).

[39] In some states the legislation passed was modeled after the Federal Tort Claims Act, ch. 753 § 401, 60 Stat. 842, 842-47 (1946) (current version at 28 U.S.C. §§ 2671-80 (1976 & Supp. V 1981)). *See, e.g.*, IDAHO CODE §§ 6-901 to -928 (1979). Other statutes provided for liability on the part of the state but placed a ceiling on the amount of recoverable damages. *See, e.g.*, N.C. GEN. STAT. §§ 143-291 (1978). Other statutes, while providing for general liability, contained lists of specific state activities that remained immune. *See, e.g.*, CAL. GOV'T CODE §§ 810-996.6 (West 1980). *See generally* Note, *supra* note 9, at 297 & n.14 (listing different categories of statutes dealing with sovereign immunity).

[40] Anderson v. Vanderslice, 240 Miss. 55, 57-58, 126 So. 2d 522, 523 (1961).

[41] 344 So. 2d 146, 151 (Miss.), *cert. denied*, 434 U.S. 831 (1977). In *Berry* the plaintiff brought suit against Hinds County for injuries suffered when the plaintiffs' automobile crashed into a collapsed bridge. The Circuit Court of Hinds County sustained the county's general demurrer and the plaintiffs appealed. *Id.* at 147. The supreme court affirmed and stated:

> Of course, the courts, as well as the legislature, have the undoubted right to abrogate the doctrine of governmental immunity. We are of the opinion, however, that the legislature is in a better position to limit and restrict claims

the opinion in *Jones v. Knight*[42] signaled a changing attitude among members of the court. All nine justices had joined in upholding the doctrine in *Berry*, but in *Jones* two dissenting justices[43] presented thirteen arguments in favor of judicial abrogation of the doctrine.[44] *Jones* served as a warning to the legislature that the court's support of sovereign immunity was diminishing.

In the instant case, the court asserted that the doctrine of sovereign immunity was outmoded[45] and disadvantageous to both members

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that can be asserted and to provide the ways and means for the paying of such claims (either by taxation or appropriation), if it should see fit to do so.

Id. at 151.

[42] 373 So. 2d 254 (Miss. 1979). *Jones* involved a suit for assault and battery brought against the Mississippi Park Commission. The Circuit Court of Yalobusha County sustained the Commission's demurrer and the plaintiff appealed. The supreme court held that while "much can be said in favor of abrogating the doctrine of sovereign immunity . . . the subject [is] one which should be addressed by the legislature." *Id.* at 256.

[43] Justice Bowling wrote the dissent in which Chief Justice Patterson joined. Justice Cofer took no part. *Id.*

[44] *Id.* at 257-67. The arguments in favor of judicial abrogation presented by Justice Bowling have been summarized as follows:

> (1) the modern availability of insurance to be purchased by the state or political subdivision; (2) the prospective nature of a ruling of abrogation, which would give state agencies an opportunity to become fully insured; (3) the inequity of leaving the state employee "holding the bag"; (4) the modern trend toward abrogation; (5) the inequity of requiring insurance coverage on vehicles operated by persons, firms, copartnerships, associations or corporations, but not on vehicles owned by the state or any of its political subdivisions; (6) the inequity of leaving the innocent person, damaged by the actions of the state agency, without a remedy; (7) the concept expressed by the statement "the king can do no wrong" is contrary to the principles for which the framers of the Constitution fought; (8) the doctrine of sovereign immunity violates Article 3, § 14, and § 24 of the Mississippi Constitution, and the fourteenth amendment to the United States Constitution; (9) the Mississippi legislature's abolition of the doctrine in certain circumstances hinders clarification of the rights of citizens coming in contact with the state; (10) the inequities of the present exceptions to the doctrine; (11) the encouragement of governmental responsibility that abrogation would foster; (12) the argument that since the doctrine was created by the judiciary, it should be abolished by the judiciary, and (13) the concern that Mississippi not be the last state to abrogate the doctrine.

1979 Mississippi Supreme Court Review, 50 MISS. L.J. 887, 889-91 (1979).

[45] Pruett v. City of Rosedale, 421 So. 2d 1046, 1047 (Miss. 1982). The court recognized that the legislature had previously authorized a few state agencies to carry insurance and had abolished their immunity to the extent of the insurance carried. The court added, "We would have hoped that this action . . . would have been extended to protect all citizens who might be injured by the sovereign, but this has not been done." *Id.* at 1047.

of the public and the sovereign state.[46] The court reasoned that because the doctrine was a creature of the judiciary,[47] the court could properly effectuate its demise.[48] The court abrogated the doctrine but held that, because the judiciary had no standards by which to judge or to review basic policymaking decisions, governmental activities involving these decisions would remain immune from tort liability.[49] Similarly, because imposition of liability could result in overly-cautious performance by certain public officials, the court ruled that officials involved in legislative, judicial, and executive acts would also retain immunity.[50] Finally, the court noted that some political entities would need time to adjust to the decision and held that the mandate of the opinion would not become effective until July 1, 1984.[51]

In *Pruett*, the court took a significant and overdue step toward providing persons injured by the negligence of public officials with an opportunity to obtain a reasonable and adequate remedy. But, as has occurred in other jurisdictions that have judicially abrogated sovereign immunity, the decision may be limited by the legislature[52] to resolve any problems arising as a result of abrogation.[53] The direction in which the legislature proceeds is of vital importance to the governing entities

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[46] *Id.*

[47] *Id.*

[48] *Id.* at 1051.

[49] *Id.* at 1052. The court stated: "The reasonable man standard of tort law is not an appropriate measure for the political, social or economic desirability of government programs and the methods selected for pursuing them." The decisionmaker must "look to considerations of public policy and not merely to professional standards or to standards of general reasonableness." *Id.*.

Many, if not all, states that abolished the doctrine of sovereign immunity continued to protect public employees and governments by enacting an exception for discretionary functions. In construing the term "discretionary," courts have placed great emphasis on the United States Supreme Court decision in Dalehite v. United States, 346 U.S. 15 (1953). *See* Note, *supra* note 9, at 297. *Dalehite* defined discretionary functions to include not only "determinations made by executives or administrators in establishing plans, specifications or schedules of operations," but also situations in which "there was room for policy judgment and decision." 346 U.S. at 35-36. Such an exception is common in states that have judicially or legislatively abolished the sovereign immunity doctrine. *See, e.g.*, Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795, 803 (1962). This exception, although widely adopted, has been criticized. *See* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 29.15, at 1661-62 (1956).

[50] 421 So. 2d at 1052.

[51] *Id.* The prospective date did not apply to the plaintiff in the case at bar. *Id.*

[52] *See supra* note 26 (discussion of legislative activity following judicial abrogation of sovereign immunity).

[53] In the instant case, the court stated that there would be legislative problems that would "take time to solve." 421 So. 2d at 1052.

of this state. Even if the legislature acquiesces in the court's decision, it may approve legislation limiting the amount of recovery in a particular case, thus benefitting governmental subdivisions by providing them with a specific basis for fiscal planning and acquisition of insurance coverage.[54] In addition, the legislature may accept tort liability as a general rule, subject to definite legislative exceptions.[55] The legislature may also reinstate the full sweep of tort immunity for "governmental" functions.[56] This course, however, would precipitate a loss of public respect for the power of the judiciary.

Reinstating the archaic doctrine of sovereign immunity would not only overrule the holding of the instant case, but would also negate two decades of progress made by the Mississippi Supreme Court. As early as 1961, the court recognized the need for reform of this doctrine, but rather than taking action, deferred to the legislature. In *Pruett*, the court took the initiative and abolished the doctrine. The future of governmental responsibility in Mississippi demands that the legislature accept this decision in shaping its future legislation. Only with this interplay of legislative and judicial policymaking will the victims of negligent acts and omissions of state employees be assured of an adequate remedy for their injuries.

Cindi Pittman Moreland

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[54] This contemplated fiscal security might not always result in justice. Even with limited legislation, cases would arise in which the maximum damages allowable would bear no rational relationship to the actual damages incurred, and as a result, equally deserving plaintiffs might receive extremely disparate awards.

[55] *See supra* note 26 (citing example of jurisdiction that limited judicial decree).

[56] *See supra* note 26 (listing jurisdictions that judicially abrogated immunity but legislatively reinstated the doctrine). In response to the instant case, a Mississippi state senator introduced legislation that would reinstate sovereign immunity in Mississippi. *See* S. 2296, Reg. Sess. (1983).

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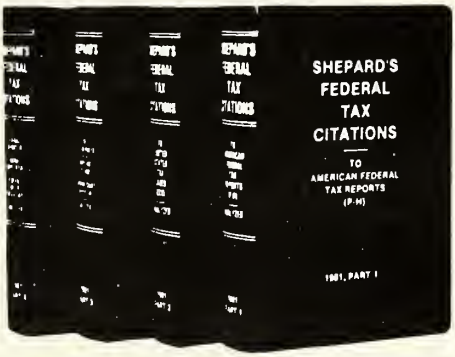

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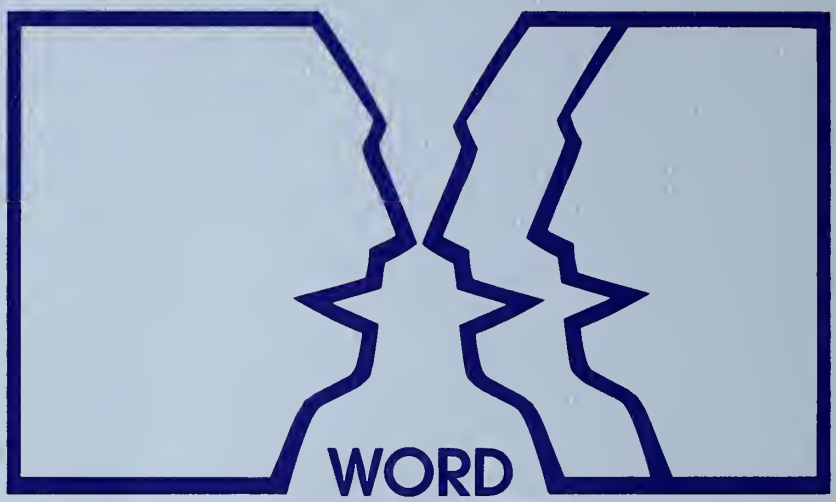

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